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(Reports)

(The Supreme Court.)

II] AUGUST [1966

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL, J. R. MUDHOLKAR, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

Sri La Sri Subramanya Desiga Gnanasambanda Pandarasannadhi .. *Appellant**

v.

The State of Madras . *Respondent.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), *section* 62 (3-*a*)—*Application by Commissioners for modifying Scheme under which the Trustee was administering the Temple—No proof of any of the charges levelled against trustee—Appointment of an Executive Officer to be in charge of administration—Not warranted—Madras Act XXII of* 1959 *enacted after the suit—Plenary powers of Commissioner*

The provisions of the scheme framed by the High Court in respect of the temple, introduced an Executive Officer to be appointed by the Commissioner and removable by him, in substance under his control, to be in charge of the entire administration of the temple Such a drastic provision may be necessary in a case where the temple is mismanaged or if there are other circumstances which compel such an appointment But in the face of the concurrent finding of fact that the Commissioner has failed to establish any of the charges levelled by him against the Trustee functioning under the original scheme, no case has been made out for the appointment of an Executive Officer who practically displaces the Trustee

The power to appoint additional trustees *in present or in future* can be affirmed.

This judgment will not preclude the Commissioner to take any action under the new Act of 1959 as the circumstances demand

Appeal from the Judgment and Decree, dated 7th February, 1958, of the Madras High Court in Appeal Suit No. 318 of 1954.

A V. Viswanatha Sastri, Senior Advocate, (*Naunit Lal*, Advocate, with him), for Appellant

A. Ranganadham Chetty, Senior Advocate, (*Miss A Vedavalli* and *A. V. Rangam*, Advocates with him), for Respondent.

*C.A. No. 272 of 1963. 8th February, 1965.

The Judgment of the Court was delivered by

Subba Rao, J. —Sri Vaidyanathaswami Temple at Vaitheeswarankoil, Sirkali Taluk, Thanjavur District, Madras State, is an ancient and famous Siva temple. It owns a large extent of immovable property and it is said that its annual income is more than Rs 2 lakhs In 1842 the British Government, which was then administering the temple, handed over its management to the Pandarasannadhi of Dharmapuram Adhinam Since then the said Pandarasannadhi has been managing the same through one of his selected disciples, a Kattalai Thambiran In the year 1919, the High Court of Madras framed a scheme for the administration of the said temple in A S No 181 of 1917 The said scheme provided, among others, that the administration of the temple should be in the hands of the Kattalai Thambiran appointed by the Pandarasannadhi, and that he should be assisted by a treasurer a shroff and an auctioneer who was to be appointed once in 3 years by the Court The Madras Legislature passed Act II of 1927 providing for the good administration of temples and their endowments The Religious Endowments Board functioning under the said Act, presumably because the administration of the temple in question was satisfactory, did not take any steps to have the scheme framed by the High Court in 1919 modified under the said Act That Act was substituted by the Madras Hindu Religious and Charitable Endowments Act, 1951 (XIX of 1951), hereinafter called the Act On 16th June, 1951, the Commissioner, Hindu Religious and Charitable Endowments, Madras, filed a petition in the Court of the Subordinate Judge, Mayuram, under section 62 (3-*a*) of the Act for modifying the scheme framed by the High Court In the petition the Commissioner, after alleging various acts of commission and omission by the Trustee and his subordinates in the management of the temple and pointing out the defects in the earlier scheme, averred that the full income of the Devasthanam had not been secured and safeguarded and that that was attributable mainly to the defective machinery set up under the scheme for the administration of the temple The most important of the modifications suggested to the scheme was that an Executive Officer should be appointed in the place of the Kattalai Thambiran and the Treasurer, conferring large powers on him for the day-to-day administration of the temple The Pandarasannadhi filed a counter-affidavit denying all the allegations made against the management of the temple and asserting that he had functioned in terms of the scheme and had piloted the temple through difficult times successfully The learned Subordinate Judge, after considering the entire material placed before him, came to the conclusion that the petitioner had not substantiated any of the allegations made against the Trustee, and that no case had been made out for amending the scheme and for the appointment of an Executive Officer In the result he dismissed the petition The State of Madras, represented by the Commissioner of Hindu Religious and Charitable Endowments, Madras, preferred an appeal against the said order to the High Court of Madras The said appeal came up before a Division Bench of the High Court In the High Court the learned Government Pleader appearing for the State did not question the correctness of the finding given by the learned Subordinate Judge that there was no proof of mismanagement of any kind by the Pandarasannadhi or the Kattalai Thambiran The learned Counsel for the Pandarasannadhi had no objection for making formal amendments to the scheme, which became necessary due to lapse of time and due to the passing of the Act After hearing the parties, the High Court modified the scheme introducing the controversial provision, *viz*, the appointment of an Executive Officer In the result, the order of the Subordinate Judge was set aside and the scheme made by the High Court in 1919 was modified This appeal has been filed, on a certificate issued by the High Court, against the said decree of the High Court.

Mr. A V Viswanatha Sastry, learned Counsel for the appellant, contends that the High Court, having agreed with the Subordinate Judge that the Commissioner had failed to establish any of the charges levelled by him against the Trustee, erred in modifying the scheme framed by the High Court in the year 1919 introducing drastic changes therein, such as putting the management of the temple under an Executive Officer who could be appointed and removed only by the Hindu Religious

and Charitable Endowments Board and also making a provision for the appointment of additional Trustees in future He has no objection to that part of the scheme introducing formal changes in the earlier scheme so as to bring it in conformity with the provisions of the Act

The arguments of Mr A. Ranganadham Chetty, learned Counsel for the State, may be stated thus. Under the Act a scheme for administration of a temple may be framed or an earlier scheme may be amended not only when there is mismanagement by the Trustee but also for providing for a better administration of the temple In the present case, though there is no mismanagement by the Trustee, the extensive immovable properties the temple owns, the existence of large arrears of rents, settlement of disputes that may arise between the tenants and the Trustee under the new tenancy laws and such others call for the appointment of a trained Executive Officer by the Commissioner in the best interests of the Temple That apart, as under the Act the Commissioner is empowered to frame a scheme if he has reason to believe that in the interests of the proper administration of a religious institution a scheme should be settled for the same, his opinion must be given almost a decisive weight by a Court in the matter of amending a scheme

To appreciate the contentions of the parties it will be convenient at the outset to notice briefly the scheme of the Act. The Act was passed to provide for the proper administration and governance of Hindu Religious and Charitable Endowments and institutions in the State of Madras It provides for the appointment of 4 classes of authorities, namely, Commissioner, Deputy Commissioners, Assistant Commissioners and Area Committees The Commissioner is the highest authority in the hierarchy Subject to the provisions of the Act, the administration of all religious endowments shall be subject to the general superintendence and control of the Commissioner and for the purpose of such control he can pass any orders which he may deem necessary to ensure that such endowments are properly administered and that their incomes are duly appropriated for the purposes for which they were founded or exist Specific duties have been allotted to the other authorities subject to the overall control of the Commissioner There are many effective provisions in the Act to ensure proper administration of temples Trustees have to keep registers for all institutions for the scrutiny of the appropriate authority. They have to furnish accounts and the accounts have to be audited in the manner prescribed in the Act The Trustees cannot alienate immovable properties or lease the same beyond 5 years without the sanction of the appropriate authority. They have to obey all lawful orders of the appropriate authorities The service conditions of the office-holders are duly protected The scales of expenditure have been standardized and a provision is made fixing the fees for *archana* and the apportionment of the same. The Trustees have to prepare budgets and get their accounts audited. There are provisions even for ordering sur-charge against Trustees. All the temples, whether governed by schemes or not, are subject to the said provisions of the Act Thus, there is a fair amount of financial and administrative control over the Trustees

The general provisions of the Act may be sufficient in the case of the temples which are properly administered ; but there may be temple without any scheme of administration or even if it has one, it may require to be improved to achieve better results Section 58 enables a Deputy Commissioner to settle a scheme for an institution if he has reason to believe that in the interests of better administration thereof a scheme should be settled for it His order framing a scheme is subject to appeal to the Commissioner Under section 62 of the Act a party aggrieved by the order can file a suit in a Court questioning in the correctness of the same and against the order of that Court an appeal lies to the High Court Under section 103 (*d*) of the Act,

> "all schemes settled or modified by a Court of law under the said Act (The Madras Hindu Religious Endowments Act, 1926) or under section 92 of the Code of Civil Procedure, 1908, shall be deemed to have been settled or modified by the Court under this Act and shall have effect accordingly."

Under section 62 (3) of the Act, any scheme modified by a Court under section 62 (2)' of the Act or any scheme framed or any scheme deemed under section 103 (*d*) to have been settled or modified by a Court can at any time be modified or cancelled by a Court on an application made to it by the Commissioner or a Trustee or any person having interest. Any party aggrieved by any order of the Court under clause (*a*) of section 62 (3) may within 90 days of the order appeal to the High Court. The effect of these provisions is that though the Deputy Commissioner settles a scheme at the first instance, an aggrieved party can finally go to a civil Court to have the scheme modified So too, a scheme framed by a Court under section 92 of the Code of Civil Procedure can be modified on an application made to a Court by the Commissioner, Trustee or any person having interest. Before the Act, there was a conflict whether the scheme framed by a Court under section 92 of the Code of Civil Procedure could be modified on an application made by an aggrieved party and that conflict is resolved under the Act by an express provision that it can be so done. Where a temple is so badly mismanaged that the administration cannot be improved by the exercise of ordinary powers under the Act or by framing a scheme, the Commissioner is given the power to notify such a temple and put it under the direct control of an Executive Officer directly responsible to him. This is in the nature of supersession of the ordinary administration of a temple. It is, therefore, clear that under the Act the administration of all temples is subject to the exercise of the powers conferred upon the authorities thereunder. The Deputy Commissioner can settle a scheme for the proper administration of a temple. If the administration of a temple is very bad, it can be superseded and the temple notified for a prescribed period. From the scheme of the said provisions we do not see any justification for the argument of the learned Counsel for the State that the Court shall accept without scrutiny the view of the Deputy Commissioner that the scheme requires modification in the manner suggested by him and that the formal approval by the Court is all that is contemplated thereunder. While we appreciate the argument that a Court shall have due regard to the views of the Commissioner or the Deputy Commissioner, as the case may be, who is in close touch with the administration of temples, we cannot persuade ourselves to hold that the Court is relieved of its duty of ascertaining the necessity for framing a scheme or to find out the propriety or advisability of the various clauses of a scheme. In framing a scheme, the Deputy Commissioner and, in a suit or application for amendment of a scheme, the Court will mould the relief under section 58 (2) of the Act having regard to the circumstances of each case. Section 58 (2) of the Act reads :

" A scheme settled under sub-section (1) for a temple of for a specific endowment other than one attached to a math may contain provision for—

(*a*) removing any existing trustee, whether hereditary or non-hereditary ,

* * * * * * *

(*b*) appointing a new trustee or trustees in the place of or in addition to any existing trustee or trustees ,

(*c*) defining the powers and duties of the trustee or trustees ,

(*d*) appointing, or directing the appointment of, a paid executive officer who shall be a person professing the Hindu religion, on such salary and allowances as may be fixed, to be paid out of the funds of the institution , and defining the powers and duties of such officer .

* * * * * * *"

The Deputy Commissioner, the Commissioner or the Court, as the case may be, is not bound, in framing a scheme, to appoint an Executive Officer in every case ; but a case will have to be made out for appointing him : that depends upon the facts established in each case.

With this background let us look at the scheme framed by the High Court The scheme is made a part of the judgment of the High Court. The clauses of the scheme read thus :

" (1) The temple of Sri Vaithianathaswami at Vaitheeswarankoil, Shiyali Taluk, and the shrines and minor temples attached thereto, and charities and endowments thereof, together com-

prise the " Velur Devasthanam ", and it shall be governed by the provisions of Act XIX of 1951 and the Rules made thereunder.

(2) The properties, movables and immovables, belonging to the Devasthanam and that may hereafter be acquired by the Devasthanam shall vest in the deity of Sri Vaithianathaswami

(3) The administration of the Devasthanam and its properties, shall vest in the Pandarasannadhi at the Dharmapuram Adhinam for the time being, who shall be the " trustee " of the Devasthanam.

(4) On the application of the Commissioner, the Court shall have the power to add two additional trustees if at some future time it is found that it is necessary to do so in the interest of the Devathanam on account of the mismanagement by the Pandarasannadhi, the Trustee.

(5) All the affairs of the Devasthanam, such as the receipt of income, incurring of expenditure, management of the property, the performance of the worship and the festivals of the temple, bringing and defending suits on behalf of the Devasthanam, shall be conducted by the Executive Officer under the supervision of the trustee, the mamool religious functions of the Kattalai Thambiran being reserved.

(6) The Trustee shall in April every year prepare a budget of the income and expenditure and such budget will be governed by the provisions of Madras Act XIX of 1951. The Trustee shall be given a discretion to spend any amount not exceeding Rs 2,000 (Rupees two thousand) every year in addition to the budgeted expenditure.

(7) (*a*) The Trustee shall from out of the five names sent to him by the Commissioner choose one of them for appointment as the Executive Officer of the Devasthanam and such person shall be appointed by the Commissioner as Executive Officer and shall be in management of the Devasthanam and its properties in the day-to-day administration including the maintenance of accounts, keeping of records, making collections and disbursements, and shall have the control of the temple servants.

(*b*) The Executive Officer shall be a First Class Executive Officer, and shall be paid such salary and employed on such terms as the Commissioner may from time to time prescribe and his powers and duties shall be regulated by Madras Act XIX of 1951 and the Rules framed hereunder.

(8) The Pandarasannadhi shall select from among the Thambirans of the Dharmapuram Adhinam a Kattalai Thambiran competent to do the religious functions of the Trustee The Pandarasannadhi will be responsible for all acts of the Kattalai Thambiranas a master for the acts of the servant.

(9) The Kattalai Thambiran shall attend to the performance in proper manner and in proper times of the daily pujas and worship and of the monthly and yearly festivals of the Devasthanam under the supervision and direction of the Executive Officer.

(10) (*a*) The *matam* building belonging to the Devasthanam in Vaitheeswarankoil shall be set apart for the residence of the Kattalai Thambiran and a sum of Rs 50 a month shall be paid to him for his maintenance and personal expenses. He will also be entitled to the enjoyment of one veli of *maniam* land as in the pre-scheme days

(*b*) The present treasurer and shroff will continue in office on the present scale of pay and they shall work under the directions of the Executive Officer and shall, do such work as is assigned to them The future treasurer and shroff will be appointed byt he Commissioner. The old scale of salary of the treasurer is reduced to the present scale of Rs 100—5—125.

(11) The Executive Officer shall, with the permission of the Commissioner, sell in public auction the jewels and ornaments gold and silver coins not in circulation and other metallic objects in the hundials except current coins and any other offerings.

(12) The Trustee shall place one or more hundials, as occasions might require, for the deposit of voluntary and compulsory offerings by the worshippers Each hundial shall be of copper brass or any other materials and shall have metallic covering with an aperture Each of such hundials shall be under double lock and sealed by the Trustee and the Executive Officer One set of keys shall be with the Executive Officer and other set with the Trustee The hundials shall be opened every day or at such intervals as the Trustee may direct in the presence of the Executive Officer and the Kattalai Thambiran and the worshippers of the temple and the collections shall be kept by the Executive Officer.

(13) In the matter of accounts, preparing abstracts, and receipts and disbursement of the Devasthanam as also of preparation publication and audit of accounts, the Executive Officer and the Trustee shall observe the procedure prescribed in Madras Act XIX of 1951 and the Rules made thereunder.

(14) The accounts of the Devasthanam shall be open to inspection by any person having interest on his giving one day's previous notice to the Executive Officer and paying a fee of Rs 5 for each day or part of a day in advance of such inspection. The person so inspecting may bring to the notice of the Commissioner any irregularity and the Commissioner may pass such orders as he may think necessary

(15) All the records of the Devasthanam shall be kept in proper order in the premises of the Devasthanam provided for the purpose in Vaitheeswarankoil, and an accurate list of all records should be maintained There shall be a record-keeper who shall be in charge of all the records and he shall

not allow any record to be taken out without the written authority of the Executive Officer and without getting proper vouchers

(16) Power is reserved to the Trustee to apply to the Commissioner for permission to use the surplus funds on such religious and charitable and other purposes as may tend to promote the cause of the institution such as an Agama Patasala or Thevara Patasala or Adhyayana Patasala or such other purposes as are prescribed by the Act

(17) The Trustee shall have the discretion to make jewels, vahanams, etc or to do thiruppani work for the Devasthanam out of the surplus income of each year after obtaining the sanction of the Commissioner and in accordance with the provisions of Act XIX of 1951 and the Rules made thereunder The Trustee shall have a discretion to spend Rs 2,000 annually over and above the sanctioned amount if necessary and if funds are available

(18) The Trustee may with the sanction of the Commissioner invest the surplus funds of the Devasthanam in such manner as is prescribed under Madras Act XIX of 1951 and the Rules made thereunder.

(19) There shall be no money dealings or transactions between the Devasthanam Trustee and the Adhinam or any of the Kattalai charities or trusts managed by the Pandarasannadhi of Dharmapuram or any person under his orders.

(20) Save as expressly provided herein the administration of the temple shall be governed by the provisions of the Madras Act XIX of 1951 and the Rules made thereunder "

It will be seen from the aforesaid provisions of the scheme that it introduces an Executive Officer to be appointed by the Commissioner and removable by him ; his salary is fixed by the Commissioner and his powers and duties are regulated by the Act and the Rules framed thereunder. In substance, he is a servant of the Commissioner and is under his control. He is to be in charge of the entire administration of the temple. Nothing can be done in the temple without his permission. It is true that he functions under the supervision of the Trustee ; but there is an essential distinction between supervision and management. If the Executive Officer disobeys him, the Pandarasannadhi cannot do anything, except perhaps to complain to the Commissioner. Such a drastic provision may be necessary in a case where the temple is mismanaged or if there are other circumstances which compel such an appointment. But there is concurrent finding of fact in this case that the Commissioner has failed to establish any of the charges levelled by him against the Trustee. It is not, therefore, possible to hold that any case has been made out for the appointment of an Executive Officer who practically displaces the Trustee;

Mr. A. Ranganadham Chetty says that the appointment of the Executive Officer is necessary in view of the great things which have to be done in the temple, like sale of 3,000 acres of land to the tenants under the new legislation at agreed prices, checking cash collections, including the hundial collections, doing away with the *ad hoc* auctioneers appointed by the Commissioner from time to time, and for auctioning leases, and all kinds of properties like jewellery, lands, etc. We have no material before us to find out what is the complicated and difficult action the Trustee has to take in the matter of selling 3,000 acres of land to the tenants, under the new legislation at agreed prices. If there is any such difficulty, the Commissioner has ample powers under the Act to issue orders or at any rate advise the Trustee in the matter of disposal of such lands. Other difficulties are not such as to necessitate the appointment of an Executive Officer practically displacing the Trustee. Further it appears from the record that the present Kattalai Thambiran is a legally qualified person and he can ordinarily be expected to look after these things with appropriate expert advice We do not think any case had been made out for the appointment of the Executive Officer.

The next objection raised by Mr. Viswanatha Sastry relates to clause (4) of the scheme, which reads :

" On the application of the Commissioner, the Court shall have the power to add two additional trustees if at some future time it is found that it is necessary to do so in the interest of the Devasthanam on account of the mismanagement by the Pandarasannadhi, the Trustee "

Clause (4) of the scheme only confers a power and it does not direct the appoint, ment of additional trustees *in presenti* or even *in futuro* Indeed, section 39 of the Act was amended in 1954 whereunder such a power is conferred even on the

Commissioner We do not think the appellant is in any way prejudiced by the said clause. Therefore, it may stand. As we are deleting the clause appointing the Executive Officer, there will be consequential amendments in the various clauses of the scheme framed by the High Court.

It is brought to our notice that in 1959 the Madras Hindu Religious and Charitable Endowments Act (XXII of 1959) was passed by the Madras Legislature. Under section 45 thereof, the Commissioner is given a plenary power to appoint an Executive Officer to any temple and, therefore, it is argued, this Court shall not interfere with the clause of the scheme providing for the appointment of an Executive Officer to the temple in question. The said Act was passed subsequent to the filing of the suit. We are deciding this appeal on the basis of the circumstances obtaining in the year 1951 when the suit was filed. It may be that under the new Act the Commissioner has higher powers than he had under the 1951 Act and subsequent events may call for the exercise of those powers. Our judgment will not preclude the Commissioner to take any action under the new Act as the circumstances demand With these observations we shall proceed to modify the scheme framed by the High Court.

In the scheme framed by the High Court, clauses, (1), (2), (3), 4, (6), 10 (*a*), (16), (17), (18), (19) and (20) will be retained, clause (7) will be deleted, and the other clauses will be amended as under :

" *Clause* (5) —The words " the Executive Officer under the supervision of " will be omitted.

Clause (8) —The word " religious " will be omitted

Clause (9) —The words " under the supervision and direction of the Executive Officer " will be omitted

Clause (10) (*b*) shall read

The Treasurer and shroff will continue in office on the present scale of pay, and they shall work under the directions of the Trustees

Clause (11) —The words " Executive Officer " shall be replaced by the word " Trustee "

Clause (12) shall read

The Trustee shall place one or more hundials, as occasions might require, for the deposit of voluntary and compulsory offerings by the worshippers Each hundial shall be of copper brass or any other materials, and shall have metallic covering with an aperture Each of such hundials shall be under double lock and sealed by the Trustee or his nominee and the Kattalai Thambiran One set of keys shall be with the Kattalai Thambiran and the other set with the Trustee or his nominee The hundials shall be opened every day or at such intervals as the Trustee may direct in the presence of the Kattalai Thambiran and the worshippers of the temple and the collections shall be kept by the Trustee

Clause (13) —The words " Executive Officer " will be substituted by the words " Kattalai Thambiran "

Clause (14) —The words " Executive Officer " will be substituted by the words " Kattalai Thambiran "

Clause (15) —The words " Executive Officer " will be substituted by the words " Kattalai Thambiran "

In the result, the decree of the High Court is modified as aforesaid. The parties will bear their respective costs throughout.

V.S. *Modified accordingly.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL, J. R. MUDHOLKAR, R. S. BACHAWAT AND V. RAMASWAMI, JJ.

Gurbinder Singh and another .. *Appellants**

v.

Lal Singh and another .. *Respondents.*

Limitation Act (IX of 1908), section 2 (4), Articles 142 and 144—Article 142 when attracted—Suit governed by Article 144—Computation of period of limitation—Tacking of adverse possession of independent trespassers—Permissibility.

In order that Article 142 of the Limitation Act is attracted the plaintiff must initially have been in possession of the property and should have been dispossessed by the defendant or someone through whom the defendant claims or alternatively the plaintiff should have discontinued possession When a suit is brought by the plaintiff for the recovery of certain property claiming that he is entitled to it as heir of its previous owner, the fact that the plaintiff was in possession of the property initially for some time will not attract Article 142 if the initial possession was under a different title altogether.

In a suit to which Article 144 of the Limitation Act is attracted the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of independent trespassers The starting point of limitation under Article 144 is the date when the possession of the defendant becomes adverse to the plaintiff Under section 2 (4) of the Limitation Act 'defendant' includes any person from or through whom a defendant derives his liability to be sued No doubt, this is an inclusive definition but the gist of it is the existence of jural relationship between different persons There can be no jural relationship between two independent trespassers.

Where, therefore properties in the possession of one trespasser are trespassed into by another trespasser, a person who obtains title to the properties through the second trespasser will, for the purposes of Article 144, be entitled to the benefit of the adverse possession of the second trespasser in addition to his own, but is not entitled to tack on the adverse possession of the first trespasser.

Appeal from the Judgment and Decree dated 21st May, 1958, of the Punjab High Court in Civil Regular Second Appeal No 263-P of 1952.

Tarachand Brijmohanlal, Advocate, for Appellants.

B. R. L. Iyenger, S. K. Mehta and *K L Mehta,* Advocates, for Respondents.

The Judgment of the Court was delivered by

Mudholkar, J.—The only question for consideration in this appeal by certificate from the High Court of Punjab is whether the suit for possession instituted by the respondents Lal Singh and Pratap Singh is within time. According to the appellants the suit is governed not by Article 141 of the Limitation Act, 1908 (IX of 1908) as held by the High Court but either by Article 142 or by Article 144 and is on that basis barred by time. While it is conceded on behalf of the respondents that the suit is not governed by Article 141 it is contended that it is governed by Article 144 and not by Article 142 and is within time. In order to appreciate the contentions it is necessary to set out the revelant facts which are no longer in dispute.

Mst. Raj Kaur was in possession of 851 kanals 18 marlas of land situate in village Dhaipai in the former State of Faridkot. Out of this land 481 kanals 7 marlas was in her possession as occupancy tenant, the landlord being the Raja of Faridkot while the remaining land was held by Mst. Raj Kaur as Adna Malik, the Aala malik again being the said Raja of Faridkot. In Samvat 1953 (A.D. 1896) Mst Raj Kaur who had two daughters Prem Kaur and Mahan Kaur, adopted the former's son Bakshi Singh and put him in possession of the whole of the land. Bakshi Singh transferred part of the land to Pratap Singh, second son of Mahan

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*C.A. No. 431 of 1963. 12th February, 1965.

Kaur, who is respondent No 2 in the appeal. Mahan Kaur had one more son Lal Singh and he is respondent No. 1 in this appeal.

In the year 1915 the Raja of Faridkot filed a suit against Bakshi Singh and Raj Kaur in the Court of Sub-Judge, Faridkot for a declaration that the adoption of Bakshi Singh was invalid. This suit was decreed on 9th February, 1916. Raj Kaur died on 14th August, 1930 On 19th February, 1934, the Raja filed two suits against Bakshi Singh and Pratap Singh for possession of the afore-mentioned lands one pertaining to the land of which Raj Kaur was occupancy tenant and the other for that of the land of which she was Adna malik. These suits were decreed on 12th March, 1938, and in execution of the decrees obtained in these suits the Raja took possession of the entire land in October, 1938. On 7th April, 1948, he sold the entire land along with some other land to one Kehar Singh for Rs. 84,357-5-0. Thereupon Gurbinder Singh and Balbinder Singh, who are the appellants before us, filed a suit for pre-emption of the land against Kehar Singh and obtained a decree in their favour. In execution of that decree they got possession of the land on 22nd June, 1950.

On 20th October, 1948, Mst Prem Kaur instituted a suit for possession of the entire land on the ground that she was the legal heir of Raj Kaur against Kehar Singh and the Raja of Faridkot. Later she impleaded the appellants as defendants to that suit and discharged the Raja of Faridkot. On 17th February, 1950, Lal Singh, respondent No. 1 filed a suit for possession of the entire land against the Raja of Faridkot and Kehar Singh. To that suit he joined Prem Kaur and Pratap Singh as defendants. Later, however, Pratap Singh was transposed as a plaintiff. Both the suits were consolidated and were tried together. The suit of Prem Kaur was dismissed by the trial Court but that of the respondents was decreed to the extent of half share in the property. Prem Kaur and the appellants preferred appeals before the District Court but that Court dismissed both the appeals. A Second Appeal was taken by the appellants as well as by Prem Kaur to the High Court and cross-objections were preferred by the respondents. The High Court dismissed these appeals as well as the cross-objections.

In the absence of any appeal by Prem Kaur against the decision of the High Court confirming the dismissal of her suit we have only to consider the claim of the respondents to half the property left by Raj Kaur. Their claim was resisted by the appellants on several grounds in the Courts below. Before us, however, only one ground is pressed and that is the suit is barred by limitation. As already stated, according to the appellants, the suit is governed either by Article 142 or by Article 144 of the Limitation Act and not by Article 141. Mr. Iyengar for the respondents does not rely upon Article 141 at all. He also contends that Article 142 has no application and that the suit is governed by Article 144 only. Mr. Tarachand Brijmohanlal for the appellants also relied on Article 144 in the alternative.

In order that Article 142 is attracted the plaintiff must initially have been in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It is no one's case that Lal Singh ever was in possession of the property. It is true that Pratap Singh was in posession of part of the property—which particular part we do not know—by reason of a transfer thereof in his favour by Bakshi Singh. In the present suit both Lal Singh and Pratap Singh assert their claim to property by succession in accordance with the rules contained in the *dastur-ul-amal* whereas the possession of Pratap Singh for some time was under a different title altogether. So far as the present suit is concerned it must, therefore, be said that the plaintiffs-respondents were never in possession as heirs of Raj Kaur and consequently Article 142 would not be attracted to their suit.

It is in these circumstances that we have to consider whether under Article 144 the suit is barred by time. The starting point of limitation set out in col. 3 of Article 144 is as follows.

"When the possession of the defendant becomes adverse to the plaintiff."

To recapitulate the events, Raj Kaur died on 14th August, 1930, whereupon under *dastur-ul-amal* her daughters Prem Kaur and Mahan Kaur became entitled to the possession of the land According to the appellants the daughters succeeding their mother took an absolute estate Assuming that that is so, what would be the position ? As already stated, Bakshi Singh and Pratap Singh were in possession of the entire land belonging to Raj Kaur Ignoring for the time being their relationship with Raj Kaur, what can be said is that they were adversely in possession to the true owners, that is, Prem Kaur and Mahan Kaur, daughters of Raj Kaur as from 14th August, 1930 Before, however, they could perfect their title against Prem Kaur and Mahan Kaur the Raja instituted a suit for possession, obtained a decree thereunder and actually entered into possession of the entire land in October, 1938. Though the Raja obtained possession under a decree of the Court he was in the eye of law nothing but a trespasser in so far as the heirs of Raj Kaur, her daughters Prem Kaur and Mahan Kaur were concerned Mahan Kaur had in fact died on 13th July, 1938, *i e*, before the Raja obtained possession Therefore, it is more accurate to say that the possession of the Raja became adverse to Prem Kaur and to the respondents Lal Singh and Pratap Singh as from October, 1938 Kehar Singh who was a transferee from the Raja stood in the Raja's position and got the benefit of the Raja's adverse possession Similarly the appellants who had pre-empted these lands under the decree obtained against Kehar Singh got advantage not only of the Raja's adverse possession but also of Kehar Singh's The sum total of the adverse possession of these three persons at the date of the respondents' suit would, however, be less than 12 years and so the respondents' suit could not be said to be barred by Article 144 if the starting point of limitation is taken to be some day in October, 1938.

Mr. Tarachand Brijmohanlal, however, advanced an interesting argument to the effect that if persons entitled to immediate possession of land are somehow kept out of possession—may be by different trespassers—for a period of 12 years or over, their suit will be barred by time. He points out that as from the death of Raj Kaur her daughters, through one of whom the respondents claim, were kept out of possession by trespassers and that from the date of Raj Kaur's death right up to the date of the respondents' suit, that is, for a period of nearly 20 years trespassers were in possession of Mahan Kaur's and after her death, the respondents' share in the land their suit must, therefore, be regarded as barred by time In other words, the learned Counsel wants to tack on the adverse possession of Bakshi Singh and Pratap Singh to the adverse possession of the Raja and those who claim through him In support of the contention reliance is placed by learned Counsel on the decision in *Ramayya* v. *Kotamma*[1] In order to appreciate what was decided in that case a brief resume of the facts of that case is necessary Mallabattudu, the last male holder of the properties to which the suit related, died in the year 1889 leaving two daughters Ramamma and Govindamma The former died in 1914 The latter surrendered her estate to her two sons The plaintiff who was a transferee from the sons of Govindamma instituted a suit for recovery of possession of Mallabattudu's property against Punnayya, the son of Ramamma to whom Mallabattudu had made an oral gift of his properties two years before his death Punnayya was minor at the date of gift and his elder brother Subbarayudu was managing the property on his behalf Punnayya, however, died in 1894 while still a minor and thereafter his brothers Subbarayudu and two others were in possession of the property. It would seem that the other brothers died and Subbarayudu was the last surviving member of Punnayya's family. Upon Subbarayudu's death the properties were sold by his daughters to the third defendant The plaintiffs-appellants' suit failed on the ground of limitation It was argued on his behalf in the Second Appeal before the High Court that as the gift to Punnayya was oral it was invalid, that consequently Punnayya was in possession as trespasser, that on Punnayya's death his heir would be his mother, that as Subbarayudu continued in possession Subbarayudu's possession was also that of a trespasser, that as neither Subbarayudu nor Punnayya completed possession

1. (1922) 42 M.L J 319 . I.L.R. 45 Mad. 370.

for 12 years they could not tack on one to the other and that the plaintiff claiming through the nearest reversioner is not barred The contention for the respondents was that there was no break in possession so as to revest the properties in the original owners, that Punnayya and Subbarayudu cannot be treated as successive trespassers and that in any event the real owner having been out of possession for over 12 years the suit was barred by limitation The High Court following the decision of Mookerjee, J., in *Mohendra Nath* v *Shamsunnessa* [1], held that time begins to run against the last full owner if he himself was dispossessed and the operation of the law of limitation would not be arrested by the fact that on his death he was succeeded by his widow, daugher or mother, as the cause of action cannot be prolonged by the mere transfer of title It may be mentioned that as Mallabattudu had given up possession to Punnayya under an invalid gift Article 142 of the Limitation Act was clearly attracted. The sons of Govindamma from whom the appellant had purchased the suit properties claimed through Mallabattudu and since time began to run against him from 1887 when he discontinued possession it did not cease to run by the mere fact of his death In a suit to which that article applies the plaintiff has to prove his possession within 12 years of his suit Therefore, so long as the total period of the plaintiff's exclusion from possession is, at the date of the plaintiff's suit, for a period of 12 years or over, the fact that this exclusion was by different trespassers will not help the plaintiff provided there was a continuity in the period of exclusion. That decision is not applicable to the facts of the case before us This is a suit to which Article 144 is attracted and the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims—but not the adverse possession of independent trespassers.

In so far as the adverse possession of Bakshi Singh and Pratap Singh is concerned it began upon the death of Raj Kaur and not during her lifetime That being so, Article 142 cannot possibly be attracted whereas the Madras decision turns upon a case to which Article 142 applied No doubt, there, on behalf of the plaintiff-appellant it was argued on the authority of *Agency Co* v *Short*[2], that in cases of successive trespassers limitation ceases to run against the lawful owner of the land after an intruder has relinquished his possession , that on the death of Punnayya it must be taken that there was an interruption in the possession and that there was an interval between Punnayya's death and Subbarayudu's taking possession in his own right however minute the interval may be and that except in the case of succession or devolution all other cases would fall within the principle enunciated in *Agency Co.'s case*[2] The learned Judges did not accept the contention but relying upon the decision in *Willis* v *Earl Howel*[3], and a passage in Dart on Vendors and Purchasers, Volume I, 7th Edition, page 474, held that the suit was barred by time It may be pointed out that on Punnayya's death his mother would be the heir and that it was established in that case that she was living with his brother Subbarayudu and his other brothers Subbarayudu would, therefore, be a presumptive reversioner on the death of his mother and there was evidence to show that she was a consenting party to Subbarayudu's enjoying the properties after Punnayya's death It is under these circumstances that the High Court found it difficult to hold that there was a fresh trespass by Subbarayudu after the death of Punnayya On the other hand, according to them, there was a continuity of possession because the person who continued to hold possession was the presumptive heir of the deceased From the facts of the case it will be clear that what was tacked on was not the possession of independent trespassers at all In the case before us what is being sought to be tacked on to the possession of the Raja and those who claim through him is the possession of Bakshi Singh and Pratap Singh The Raja in his suit against Bakshi Singh challenged the right of Bakshi Singh and Pratap Singh to possession on the ground that they were trespassers As it has turned out, the possession of the Raja, though obtained under the decree of a civil Court, was in itself a trespass on the rights of

1. (1941) 21 C L J 157, 164.
2 (1888) L R. 13 A C 793.
3. L R, (1893) 2 Ch. 545

the persons who were in law entitled to possession of property Thus this is a case of one trespasser trespassing against another trespasser There is no connection between the two and, therefore, in law their possession cannot be tacked on to one another. As pointed out by Varadachariar J , in *Rajagopala Naidu* v *Ramasubramania Ayyar*[1] :

> " Further the doctrine of independent trespassers will come in only when the second man trespasses upon the possession of the first or the first man abandons possession "

where it applies the principle laid down in *Agency Co.'s case*[2] would apply and preclude the tacking of possession of successive trespassers The following observation of Lord Macnaghten in that case are pertinent and run thus

> "They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrustion took place There is no one against whom he can bring an action He cannot make any entry upon himself There is no positive enactment, nor is there any principle of law which requires him to do any act, to issue any notice or to perform any ceremony in order to rehabilitate himself No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant There is not, in their Lordships' opinion, any analogy between the case supposed and the case of successive disabilities mentioned in the statute There the statute 'continues to run' because there is a person in possession in whose favour it is running "

This view has not been departed from in any case At any rate none was brought to our notice where it has not been followed Apart from that what we are concerned with is the language used by the Legislature in the third column of Article 144 The starting point of limitation there stated is the date when the possession of the defendant becomes adverse to the plaintiff The word " defendant " is defined thus in section 2 (4) of the Limitation Act thus .

> " 'defendant' includes any person from or through whom a defendant derives his liability to be sued "

No doubt, this is an inlcusive definition but the gist of it is the existence of a jural relationship between different persons There can be no jural relationship between two independent trespassers Therefore, where a defendant in possession of preperty is sued by a person who has title to it but is out of possession what he has to show in defence is that he or anyone through whom he claims has been in possession for more than the statutory period An independent trespasser not being such a person the defendant is not entitled to tack on the previous possession of that person to his own possession In our opinion, therefore, the respondent's suit is within time and has been rightly decreed by the Courts below. We dismiss this appeal with costs.

V K *Appeal dismissed.*

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1. A.I R. 1935 Mad. 449.
2. (1888) L R. 13 A C 793.

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K SUBBA RAO, J. C SHAH AND R S BACHAWAT, JJ

State of Madras .. *Appellant**

v.

Kunnakudi Melamatam *alias* Annathana Matam and another .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XIX of 1951), sections 62, 93, 103 (1)—Institution held to be not a Math under the Madras Act II of 1927—Finality of the decision—Claim for contribution and audit fees on the basis that it was a Math—Not sustainable under Madras Act II of 1927—Injunction to restrain levy of contribution under Act XIX of 1951—Question cannot be entertained in a suit not instituted under section 62 of the Act of 1951—Section 103 (1) of Act of 1951—No continuance of levy was alleged under the Act of 1927 —Estoppel—Institution is one outside the Act of 1927—Act of Head of institution—Not to affect the position of the Institution.

The institution in question had been held to be not a Math as defined under the Madras Act II of 1927 and thus was outside the purview of the Act The present suit filed by the Head of the institution, in 1951, was a composite suit, claiming two different reliefs, namely (1) an injunction restraining the levy of contribution and audit fees under Act II of 1927 and (2) an injunction restraining the levy of contributions and audit fees under Act XIX of 1951 The High Court held that the institution was not a Math within the meaning of the Act XIX of 1951 The State appealed,

Held,

One of the disputes in the suit, whether the institution is a religious institution within the meaning of Act XIX of 1951 specific provision is made in sections 57, 61 and 62 for determination by the specified authorities and eventually by a suit under section 62 The present suit is not brought under or in conformity with section 62 and consequently, in so far as the suit claimed the relief of injunction restraining the levy of contribution and audit fees under the Act XIX of 1951, it is barred by section 93 of the Act. The decision of the Board in 1932 under Act of 1927 was final for the purpose of that Act, but it is not final for purposes of the Act XIX of 1951

The decision of the Board under section 84 (1) of the Act of 1927 holding that the institution was outside the purview of the Act, had become final in the absence of any application made to the Court to set aside that decision under section 84 (2) The claim for injunction restraining the levy of contribution and audit fees under the Act of 1927 has to be upheld Under section 103 (1) of the Act of 1951, contribution not legally payable under the Act of 1927 cannot be made enforceable under the Act of 1951

The Board could not levy contribution from an institution which was not a Math under the Act of 1927 having regard to the finality of the decision under section 84 Estoppel could not confer on the Board a power which it did not otherwise possess under the Act The Institution is not estopped by any act or conduct of the Head from contending that it is not a Math within the meaning of the Act of 1927.

Appeal by Special Leave from the Judgment and Order dated 7th January, 1960, of the Madras High Court in Second Appeal No. 1165 of 1955.

A Ranganadham Chetty, Senior Advocate (*A. V. Rangam*, Advocate, with him), for Appellant

A. V. Viswanathan Sastri, Senior Advocate (*T. K Sundararaman*, Advocate, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

Bachawat, J—The institution popularly known as Kunnakudi Melamatam *alias* Annathana Matam was founded more than 80 years ago by Sri La Sri Maunanandaswami, with the object of feeding and rendering relief to poor pilgrims visiting Kunnakudi. The institution was managed by Maunanandaswami during his lifetime and thereafter by his successors, Annamalai, Nityanandaswami, Poorananda and Ganapathiswamigal By his will dated 12th December, 1935, Ganapathi-

* C A No. 445 of 1963. 17th February, 1965.

swamigal named Muthuramalingam and Nityanandaswami (II) as his successors Muthuramalingam now claims to be the sole *de facto* and *de jure* trustee of the institution There are four *Samadhis* inside the Matam premises. A *Lingam* is said to be over the *Samadhi* of the founder, and there are idols of *Vinayagar* on either side of the *Samadhi*. There is an idol of a *Nandi* over another *Samadhi*.

The Madras Hindu Religious Endowments Act, 1926 (Madras Act II of 1927) came into force on 8th February, 1927. Section 9 (7) of the Act defines ' Math' as follows

" ' Math ' means an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage , and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution. "

Section 84 of the Act read thus :

" 84 (1) If any dispute arises as to whether an institution is a math or temple as defined in this Act or whether a temple is an excepted temple, such dispute shall be decided by the Board.

(2) Any person affected by a decision under sub-section (1) may, within one year, apply to the Court to modify or set aside such decision , but subject to the result of such application, the order of the Board shall be final. "

A question having arisen whether the institution is a Math or a temple as defined in the Act, Sri Ganapathiswamigal, the then head of the institution, preferred a petition dated 6th October, 1931, to the Board of Commissioner for Hindu Religious Endowments praying for a declaration that the institution was not a Math as defined in the Act, and was outside the purview of the Act. After enquiry, the Board by its order dated 12th February, 1932, held that the institution was outside the purview of the Act The Board held that *Samadhis* of this type could not come under the operation of the Act, and the feeding of the pilgrims was not connected with service in any religious institution. Shortly thereafter, Sri Ganapathiswamigal executed a will dated 12th December, 1935, whereby he appointed his successors. Under this will, he charged his successors to manage and look after the properties of the institution and directed that they shall " carry on, as is done at present, the *Vedanta Adwaita Gnana Vicharana,* shall read the gnana Sastras and shall also teach the disciples " He also directed his successors to perform certain *Abishekams* and *Gurupoojas,* to maintain the disciples and to offer food profusely by way of alms to the good and respectable people and the *Sadhus.*

On 13th November, 1949, Muthuramalingam filed a petition before the Board asking the Board to take steps for safeguarding the properties of the institution. Subsequently, he filed other petitions requesting the Board to protect the properties of the institution and to remove Nityanandaswami (II) from its trusteeship Thereafter, the Board appears to have proceeded on the footing that the institution is a *Matam* within the purview of the Act. The Board fixed the annual income of the institution at Rs 11,800, and served the institution notices of assessment for faslis 1356, 1357, 1358 and 1359 levying contributions at Rs 354 per fasli and audit fees at Rs 177 per fasli. Muthuramalingam filed petitions before the Board challenging the assessment and also praying for time to make the payments

On 17th March, 1951, the institution represented by Muthuramalingam filed a suit impleading the Madras Hindu Religious Endowments Board and Nityanandaswami (II) as defendants and praying for an order of injunction, restraining the Board from levying any contribution under sections 69 and 70 of the Act, on the allegation that the institution was outside the purview of the Act and the levy was otherwise illegal. During the pendency of the suit, on 28th August, 1951, the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act XIX of 1951) came into force. Section 103 (i) of Act XIX of 1951 provided that all suits pending against the Board under the provisions of Act II of 1927 might be continued against the Commissioner of the Hindu Religious Endowments appointed under Act II of 1927. Accordingly, on or about 30th November, 1951, the plaint was amended by impleading the Commissioner as the third defendant. The prayer portion of the plaint was also amended by inserting a claim of injunction restraining the third defendant from

levying any contribution under Act XIX of 1951. On 30th January, 1954, the District Munsif, Manamadurai dismissed the suit mainly on the ground that the plaintiff by his own conduct having invited the third defendant to interfere with the administration of the institution was disentitled to the discretionary relief of injunction The Subordinate Judge, Sivaganga reversed the judgment of the trial Court, and decreed the suit, holding that, as the order of the Board dated 12th February, 1932, had become final, the Board under Act II of 1927 and the Commissioner under Act XIX of 1951 could not proceed against the institution under those Acts at all, and could not levy the contributions and the audit fees from the plaintiff. On further appeal, the Madras High Court by its order dated 11th August, 1958, held that in view of changed circumstances the Board could go behind its previous decision dated 12th February, 1932, and called for a finding from the Subordinate Judge of Sivaganga on the question whether the institution was Math. By his order dated 29th November, 1958, the Subordinate Judge, Sivaganga recorded the finding that the institution is not a Math as defined in Act II of 1927 or in section 6 (10) of Act XIX of 1951. On further hearing of the appeal on 7th January, 1960, the High Court accepted the findings of fact recorded by the Subordinate Judge, and held that the institution was not a Math within the meaning of section 6 (10) of Act XIX of 1951, and on this finding, dismissed the appeal but at the same time, directed that a scheme should be framed under section 92 of the Code of Civil Procedure for the proper administration of the trust, and a copy of the judgment be forwarded to the Advocate-General for necessary action. The State of Madras represented by the Commissioner now appeals to this Court by Special Leave.

In this appeal, it is conceded on behalf of all the appearing parties that the directions of the High Court with regard to the framing of a scheme are misconceived, and must be set aside. In the Courts below a contention that sections 76 (1) and 76 (2) of Act XIX of 1951 were *ultra vires* was raised, but that contention is no longer pressed.

In the judgment of the High Court dated 7th January, 1960, the reasons for holding that the institution is not a Math within the meaning of section 6 (10) of the Act are given thus :

> " First of all, there are no properties attached to this institution as such , secondly there is no college for propaganda of Hindu Religion But sadhus meet there and are given facilities for the calm and peaceful performance of their religious practices and acts Thirdly, the head of the institution is not engaging himself in imparting any religious instructions or rendering spiritual services Fourthly, there is no initiation of sishyas as monks and no upadesam is given to lay disciples initiating them into the mysteries of the particular cult. Fifthly, there is no continuity in the spiritual head in the sense that there is no automatic self-regulating mechanism for the devolution of the office Therefore these five clinching circumstances show that it is not a mutt within the meaning of section 6 (10) of the Act "

Curiously, in recording this finding the High Court did not take into account the relevant recitals and statement in the will of Ganapathiswamigal dated 12th December, 1935, which have a material bearing on the question whether the institution is a Math. Elaborate arguments were advanced before us on the question whether the institution is a Math within the meaning of Act II of 1927 and Act XIX of 1951. In view of our conclusions on other points, we think that it is not open to us to decide in this appeal whether the institution is a Math within the meaning of those Acts, and the point must be left open.

The suit, as it stands now, is a composite suit, claiming two different reliefs, namely, (1) an injunction restraining the levy of contributions and audit fees under Act II of 1927, and (2) an injunction restraining the levy of contributions and audit fees under Act XIX of 1951. The two reliefs must be considered separately.

We shall consider firstly the claim of injunction restraining the levy of contributions and audit fees under Act XIX of 1951. Section 6 (10) of this Act defined Math thus :

> " ' math ' means a Hindu religious institution with properties attached thereto and presided over by a person whose duty it is to engage himself in imparting religious instruction or rendering spiritual service to a body of disciples or who exercises or claims to exercise spiritual headship over such a body, and includes places of religious worship or instruction which are appurtenant to the institution "

Section 6 (15) of the Act defined " religious institution " as meaning a math, temple or specific endowments. Section 57 of the Act provided :

> " Subject to the rights of suit or appeal hereinafter provided, the Deputy Commissioner shall have power to inquire into and decide the following disputes and matters

Under section 61 of the Act, an appeal lay to the Commissioner from the order of the Deputy Commissioner, and under section 62 of the Act, any party aggrieved by the order of the Commissioner might within ninety days of the order institute a suit in the Court against the order. Section 93 of the Act read :

> " No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act "

Now, one of the disputes in this suit is whether the institution is a religious institution within the meaning of Act XIX of 1951. Specific provision is made in sections 57, 61 and 62 of the Act for determination of that dispute by the Deputy Commissioner, the Commissioner and eventually by a suit instituted in a Court under section 62. The present suit is not brought under or in conformity with section 62 and consequently, in so far as the suit claims the relief of injunction restraining the levy of contribution and audit fees under Act XIX of 1951, it is barred by section 93 of the Act. The decision of the Board dated 12th February, 1932, was given under Act II of 1927 and was final for purposes of that Act but it is not final for purposes of Act XIX of 1951.

We shall next consider the claim of injunction restraining the levy of contribution and audit fees under Act II of 1927. By its order dated 12th February, 1932, the Board had decided that the institution was outside the purview of Act II of 1927. That decision was given under section 84 (1) of the Act No application was made to the Court to modify or set aside the decision in accordance with section 84 (2). Consequently by the express words of section 84 (2), the decision of the Board became final, and for purposes of Act II of 1927, the correctness of the decision is not now open to challenge on the ground that it is erroneous. But Mr. Chetty argued that the decision, though binding on the institution, is not binding on the Board. We cannot accept this contention The decision is final and binding on the Board also for purposes of Act II of 1927. Mr Chetty argued secondly that in view of sections 13 and 15 of the Madras General Clauses Act (Madras Act I of 1891) the Board could decide the question whether the plaintiff is a religious institution as often as occasions arose, and its power was not exhausted by the decision given on 12th February, 1932. This argument is misconceived. The sections relied upon do not authorise revocation or annulment of a decision, which has become final. Mr Chetty next contended that the character of the institution was changed by the will of Ganapathiswamigal, dated 12th December, 1935, and consequently, the decision dated 12th February, 1932, ceased to be binding under Act II of 1927. This contention must also be rejected. Ganapathiswamigal had no power to change the character of the institution, and, as a matter of fact, he did not purport to do so by his will. Mr. Chetty next contended that by making the assessment of the contributions under section 70 of the Act, the Board gave a decision under section 84 (1) that the institution was a Math as defined in the Act, and that decision has become final under section 84 (2). There is no substance in this contention. The order of assessment is not produced. It is not shown that any dispute then arose whether the institution was a Math as defined in the Act, or that the Board decided that dispute by its order of assessment.

Mr. Chetty argued that by reason of section 103 (i) of Act XIX of 1951, all contributions under Act II of 1927 are payable under Act XIX of 1951 and the assessment and demand in respect of those contributions are enforceable under the latter Act and consequently the suit challenging such assessment and demand is barred by section 93 of Act XIX of 1951. There is no substance in this contention. As the institution was not a Math within the meaning of Act II of 1927 in view of the final decision of the Board dated 12th February, 1932, the contributions demanded under Act II of 1927 were not legally payable to the Board under that Act. Conse-

quently, those contributions were not payable under Act XIX of 1951, and the assessment and demand in respect thereof were not enforceable under the latter Act by reason of section 103 (1) thereof. Section 93 of Act XIX of 1951 did not bar a suit pending on the date of commencement of the Act claiming an injunction restraining the levy of contributions and audit fees under Act II of 1927 on the ground that the institution was outside the purview of Act II of 1927.

Mr Chetty lastly contended that in view of the conduct of Muthuramalingam asking the Board to interfere with the management of the institution on the ground that it is a Math, the plaintiff is estopped from asserting that it is not a Math within the purview of Act II of 1927. This contention must be rejected. The Board could not levy contribution from an institution which was not a Math under Act II of 1927 having regard to the final decision of the Board dated 12th February, 1932. Estoppel could not confer on the Board a power which it did not otherwise possess under the Act Morevoer, it is not shown that by reson of the acts of Muthuramalingam, the Board came to believe that the institution was a Math and to act upon such belief. The plaintiff is not estopped by any act or conduct of Muthuramalingam from contending that is it not a Math within the meaning of Act II of 1927.

The result is that the appeal is partly allowed, the suit is decreed in so far it claims injunction restraining the levy of contributions from the plaintiff under sections 69 and 70 of Madras Act II of 1927 and from taking any coercive steps in pursuance of any demands against the plaintififf under Act II of 1927, and the suit is dismissed, in so far as it claims injunction restraining the levy of contributions and taking any coercive steps in respect of demands against the plaintiff under Madras Act XIX of 1951 The success being divided, we direct that the parties will pay and bear their own costs throughout, in this Court and in the Courts below

V.S. *Appeal allowed in part.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT —K SUBBA RAO, RAGHUBAR DAYAL, J. R MUDHOLKAR, R S BACHAWAT AND V. RAMASWAMI, JJ.

Amireddi Raja Gopala Rao and others . *Appellants**

v.

Amireddi Sitharamamma and others *Respondents*

Hindu Law—Brahmin woman whose husband was alive becoming concubine of sudra and having children by him—Avaruddha Stree *entitled to maintenance out of paramours estate for herself and her children,—Right to maintenance if destroyed by Hindu Adoptions and Maintenance Act (LXXVIII of* 1956) *coming into force during pendency of appeal against decree giving maintenance*

Under the Hindu Law as it stood in 1948 (when the paramour died in the instant case) a married woman who left her husband and lived with her paramour as his permanently kept mistress could claim the status of an *Avaruddha Stree* by remaining faithful to her paramour though the connection was adulterous and was entitled to maintenance from the estate of the paramour so long as she preserved her sexual fidelity to him *Akku Prahlhad* v *Ganesh Pralhad,* I.L R (1945) Bom 604, 614 approved A *Swairini* and other adultress kept in concubinage could claim the status of an *Avaruddha Stree* The connection was no doubt immoral, but concubinage itself is immoral yet it was recognised by law for the purpose of founding a claim for maintenance by her and her illegitimate sons The paramour may be punishable for the offence of adultery, but the concubine is not punishable as abettor of the offence. Whether or not a *Pratiloma* marriage was valid under the old Hindu law a claim for maintenance by an *Avaruddha Stree* cannot be defeated on the ground that she was a Brahmin and her paramour was a *Sudra*

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* C A No 434 of 1963. 18th February, 1965

In the instant case the paramour died in 1948 Suit was instituted by the concubine in December, 1949 and decreed in 1954 The Hindu Adoption and Maintenance Act (1956) came into force during the pendency of the appeal against the decree On the question whether the right to maintenance decreed in favour of the concubine was taken away by the Act

Held : Sections 21 and 22 read with section 4 of the Act do not destroy or affect any right of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu Law in force at the time of his death

Decision of the High Court in (1960) 2 An W R 352 (F.B) affirmed

Appeal from the Judgment and Decree dated 22nd July, 1960, of the Andhra Pradesh High Court in Appeal Suit No 709 of 1954.*

A Ranganadham Chetty, Senior Advocate (*Miss. A Vedavali* and *A. V. Rangam*, Advocates, with him), for Appellants.

M. S K. Sastri and *M S. Narasimhan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Bachawat, J :—The first respondent, Seetharamamma, is a Brahmin woman. She was married to one Ramakrishnaya During the lifetime of her husband she became the concubine of one Lingayya, a *Sudra* by caste From 1938 until the death of Lingayya in February, 1948, she was the permanently kept concubine of Lingayya and lived with him. During this period and thereafter, she preserved sexual fidelity to Lingayya The second, third and fourth respondents are the sons of the first respondent by Lingayya. The husband of the first respondent is still alive. The appellants are the brothers and brothers' sons of Lingayya. Lingayya was separate in estate from his brother and brothers' sons. The parties are residents of Choragudi. Baptala now in Andhra Pradesh and governed by the Mitakshara school of Hindu law In the plaint, as originally filed, the respondents claimed that they were exclusively entitled to the estate left by Lingayya. The Subordinate Judge and the High Court found that as the first respondent was and continued to be a married woman while she lived with Lingayya and bore him children. she was not the lawfully wedded wife of Lingayya and the children born of the union were not his legitimate sons, nor were they *Dasiputras* and as such entitled to his properties. The suit was originally dismissed by the Subordinate Judge, but on appeal, the High Court gave the respondents leave to amend the plaint by making suitable averments for the award of maintenance, and remanded the suit for trial on the question of maintenance. At the subsequent trial on the amended plaint, the Subordinate Judge decreed the respondents' claim for maintenance and consequential reliefs and awarded to them maintenance during their lifetime out of the estate of Lingayya. The Subordinate Judge passed his decree on 20th September, 1954. During the pendency of the appeal preferred by the appellants before the High Court the Hindu Adoptions and Maintenance Act of 1956 (hereinafter referred to as the Act) came into force. The main controversies in the appeal before the High Court were (1) whether the provisions of the Act are retrospective , and (2) whether a married woman who left her husband and lived with another as his permanently kept mistress could be regarded as an *Avaruddha Stree*. In view of the importance of these questions, the appeal was referred to a Full Bench of the High Court. On the first question, the High Court held that the relevant provisions of the Act applied only to the estates of Hindus dying after the commencement of the Act, and that the right of the respondents to maintenance during their lifetime under the Hindu law in force at the time of the death of Lingayya was not affected by the Act. On the second question, the High Court held that the first respondent was an *Avaruddha Stree* of Lingayya and was entitled to maintenance from his estate, though her husband was alive and the connection with Lingayya was adulterous. The High Court agreed with the Subordinate Judge with regard to quantum of maintenance.

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*(1960) 2 An W R. 352 (F B).

On behalf of the appellants, it is contended that the respondents are not entitled to claim any maintenance from the estate of Lingayya under the Hindu law as it stood prior to the commencement of the Act, because (*a*) the first respondent is not a *Dasi* and the second, third and fourth respondents are not *Dasiputras* of Lingayya, and this point is concluded by the previous judgment of the High Court, which has now become final between the parties, (*b*) the husband of the first respondent was and is still alive, and the connection of the first respondent with Lingayya was adulterous during the period of her intimacy with Lingayya and while she bore him children, (*c*) the first respondent being a brahmin adulteress and Lingayya being a *Sudra*, the connection was *Pratiloma* and illegal.

Now under the Hindu law as it stood before the commencement of the Act, the claim of a *Dasiputra* or the son of a *Dasi*, that is, a Hindu concubine in the continuous and exclusive keeping of the father rested on the express texts of the Mitakshara, Ch. I, S. 12, V 1, 2 and 3. In the case of *Sudras*, the *Dasiputra* was entitled to a share of the inheritance, and this share was given to him not merely in lieu of maintenance but in recognition of his status as a son, see *Gur Narain Das and another* v *Gur Tahal Das and others*[1] But the illegitimate son of a *Sudra* by his concubine was not entitled to a share of the inheritance if he were the offspring of an incestuous connection, see *Datti Parisi Nayudu* v. *Datti Bangaru Nayudu*[2], or if at the time of his conception, the connection was adulterous, see *Rahi and others* v *Govind Valad Teja*[3], *Narayan Bharthi* v. *Laving Bharthi and others*[4], *Tukaram* v. *Dinkar*[5]. Such an illegitimate son could not claim the status of a member of his father's family and could not get a share of the inheritance as a *Dasiputra* under the express texts of the Mitakshara. For this reason, the previous judgment of the High Court rightly held that the second, third and fourth respondents were not *Dasiputra* of Lingayya, and could not claim the inheritance. But the point whether they are entitled to maintenance out of the estate of Lingayya is not concluded by the previous judgment It is well recognised that independently of the express texts of the Mitakshara, Ch I, S 12, V. 3, the illegitimate son of a *Sudra* was entitled to maintenance out of his father's estate though his mother was not a *Dasi* in the strict sense and though he was the result of a causal or adulterous intercourse. It was not essential to his title to maintenance that he should have been born in the house of his father or of a concubine possessing the peculiar status therein, see *Muttuswamy Jagavera Yettappa Naicker* v *Vencateswara Yettayya*[6]. The illegitimate son of a *Sudra* was entitled to maintenance out of his father's estate, though at the time of his conception his mother was a married woman, her husband was alive and her connection with the putative father was adulterous, see *Rahi* v. *Govind*[3], *Viraramuthi Udayan* v. *Singaravelu*[7], *Subramania Mudaly* v. *Valu*[8]. According to the Mitakshara school of law, the illegitimate son of a *Sudra* was entitled to maintenance from his father's estate during his lifetime. Under the Hindu Law, as it stood prior to the commencement of the Act, the first second and third respondents were, therefore entitled to maintenance during their lifetime, out of the estate of Lingayya.

The claim of an *Avaruddha Stree* or woman kept in concubinage for maintenance for her lifetime against the estate of her paramour rested on the express text of a Mitakshara, Ch 2, S. 1, Vs. 27 and 28 read with V 7. In *Bai Nagubai* v. *Bai Monghibai*[9], where the man and the woman were Hindus and the paramour was governed by the law of the Mayuka, Lord Darling said ·

> " providing the concubinage be permanent, until the death of the paramour, and sexual fidelity to him be preserved, the right to maintenance is established, although the concubine be not kept in the family house of the deceased "

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1 (1952) S C J 305 (1952) 2 M L J 251 1952 S C R 869, 875
2 (1869) 4 M H C R 204
3. (1875) I L R 1 Bom 97
4 (1878) I L R 2 Bom 140
5. (1931) 33 Bom L R. 289
6 (1868) 12 M I A 203, 220
7 (1877) I L R 1 Mad 306
8. (1911) 20 M L J 350 I L R 34 Mad. 68
9 (1926) I L R 50 Bom 604, 614

The law of the Mitakshara is in agreement with the law of the Mayuka on this point In the instant case, the first respondent being continuously and exclusively in the keeping of Lingayya until his death for about 10 years, the concubinage has been found to be permanent. She observed sexual fidelity to Lingayya during his lifetime, and after his death has continued to preserve her qualified chastity. In *Akku Prahlhad* v. *Ganesh Pralhad*[1], a Full Bench of the Bombay High Court held that a married woman who left her husband and lived with her paramour as his permanently kept mistress could claim the status of an *Avaruddha Stree* by remaining faithful to her paramour, though the connection was adulterous, and was entitled to maintenance from the estate of the paramour so long as she preserved her sexual fidelity to him This Full Bench decision overruled the decision in *Anandilal Bhagchand* v *Chandrabai*[2], and followed the earlier decisions in *Khemkore* v *Umiashankar*[3], and *Ningareddi* v *Lakshmawa*[4]. The decision in *Akku Pralhad* v. *Ganesh Pralhad*,[1] has been subject of strong criticism in Mayne's Hindu Law and Usage, 11th Edn, Article 683, page 816, edited by Sri Chandrashekhara Aiyar and in a learned Article in *Chinna Mahali Mudali* v. *Nanjappa Goundan*[5], but the Full Bench of the Andhra Pradesh High Court in the instant case found themselves in complete agreement with the Bombay decision. We are of the opinion that the Bombay decision lays down the correct law.

Avaruddha Stree, as understood by Vijnananeswara, includes a *Swairini* or adulteres kept in concubinage While dealing with the assets of a deceased Hindu not liable to partition, Mitakshara, Ch. I, S. 4, V 22, he says, " Swairini and others who are *Avaruddha* by the father, though even in number, should not be divided among the sons". Colebrook's translation of the passage is as follows · " But women (adulteresses and others) kept in concubinage by the father must not be shared by the sons, though equal in number " In his commentary on Yajnavalkya's Verse 290 in *Vyavahara Adhyaya*, Chapter 24 on *Stree Sangrahana*, Vijaneswara, citing Manu, explains *Swairini* as a woman who abandons her own husband and goes to another man of her own *Varna* out of love for him Thus, a *Swairini* and other adulteress kept in concubinage could claim the status of an *Avaruddhu Stree*. The connection was no doubt immoral, but concubinage itself is immoral; yet it was recognised by law for the purpose of founding a claim for maintenance by her and her illegitimate sons. The paramour may be punishable for the offence of adultery, but the concubine is not punishable as abettor of the offence.

A concubine was not disqualified from claiming maintenance by reason of the fact that she was a brahmin. The claim of a concubine who was a respectable woman of the brahmin caste and her illegitimate son for maintenance was allowed in *Hargovind Kuari* v. *Dharam Singh*[6]. No doubt, a *Pratiloma* connection is denounced by the Smriti-writers and the Commentators, and before the Hindu Marriages Validity Act, 1949 (XXI of 1949) *Pratiloma* marriages between a *sudra* male and a brahmin female were declared invalid in *Bai Kashi* v. *Jamnadas*[7] and in *Ramchandra Doddappa* v. *Hanamnaik Dodnaik*[8], but even those cases recognise that a brahmin concubine in the exclusive and continuous keeping of a sudra until his death was entitled to claim maintenance We express no opinion on the question whether a *Pratiloma* marriage was valid under the old Hindu law, but we are satisfied that the claim of the respondents for maintenance cannot be defeated on the ground that the first respondent was a brahmin and her paramour was a *sudra*.

We are satisfied that the respondents were entitled to maintenance during their lives out of the estate of Lingayya under the Hindu law as it stood in 1948, when Lingayya died, in December, 1949, when the suit was instituted and also in 1954, when the suit was decreed by the Subordinate Judge The question is

1 I L R (1945) Bom. 216 (F.B).
2. (1924) I L R. 48 Bom 203
3 (1873) 10 Bom H C R 381.
4 (1901) I L R. 26 Bom 163.
5 (1946) 1 M L J (N I C) 1
6 (1884) I L R 6 All 329
7 (1912) 14 Bom L R 547
8 (1936) I L R. 60 Bom 75.

whether this right is taken away by the Hindu Adoptions and Maintenance Act, 1956, which came into force during the pendency of the appeal to the High Court. The Act is intended to amend and codify the law relating to adoptions and maintenance among Hindus Section 4 of the Act is as follows :

> "4 Save as otherwise expressly provided in this Act,—
>
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act,
>
> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act "

Section 21 defines " dependants " as meaning certain relatives of the deceased, and under sub-clause (viii), includes " his or her minor illegitimate son, so long as he remains a minor". A concubines is not one of the persons within the definition of " dependants " given in section 21, and an illegitimate son is not a dependant when he ceases to be a minor Section 22 reads thus

> "22 (1) Subject to the provisions of sub-section (2), the heirs of a deceased Hindu are bound to maintain the dependents of the deceased out of the estate inherited by them from the deceased
>
> (2) Where a dependent has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate
>
> (3) The liability of each of the persons who takes the estate shall be in proportion to the value of the share or part of the estate taken by him or her
>
> (4) Notwithstanding anything contained in sub-section (2) or sub-section (3), no person who is himself or herself a dependent shall be liable to contribute to the maintenance of the others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act "

Sub-section (1) of section 22 imposes upon the heirs of a deceased Hindu the liability to maintain the dependants of the deceased defined in section 21 out of the estate inherited by them from the deceased, but this liability is subject to the provisions of sub-section (2), under which only a dependant who has not obtained by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of the Act is entitled, subject to the provisions of the Act, to maintenance. Specific provisions is thus made in section 22 with regard to maintenance of the dependants defined in section 21 out of the estate of the deceased Hindu, and in view of section 4, the Hindu law in force immediately befreo the commencement of the Act ceases to have effect after the commencement of the Act with respect to matters for which provision is so made. In terms sections 21 and 22 are prospective. Where the Act is intended to be retrospective, it expressly says so Thus, section 18 provides for maintenance of a Hindu wife, whether married before or after the commencement of the Act, by her husband, section 19 provides for the maintenance of a Hindu wife, whether married before or after the commencement of the Act, by her father-in-law, after the death of her husband, and section 25 provides for alteration of the amount of maintenance whether fixed by a decree of Court or by agreement either before or after the commencement of the Act Now, before the Act came into force, rights of maintenance out of the estate of a Hindu dying before the commencement of the Act were acquired and the corresponding liability to pay the maintenance was incurred under the Hindu law in force at the time of his death It is a well-recognised rule that a statute should be interpreted, if possible, so as to respect vested rights, and such a construction should never be adopted if the words are open to another construction See Craies on Statute Law, 6th Edition (1963), page 397 We think that sections 21 and 22 read with section 4 do not destroy or affect any right of maintenance out of the estate of a deceased Hindu vested on his death before the commencement of the Act under the Hindu law in force at the time of his death.

On the death of Lingayya, the first respondent as his concubine and the second, third and fourth respondents as her illegitimate sons had a veted right of

maintenance during their lives out of the estate of Lingayya. This right and the corresponding liability of the appellants to pay maintenance are not affected by sections 21 and 22 of the Act. The continuing claim of the respondents during their lifetime springs out of the original right vested in them on the death of Lingayya and is not founded on any right arising after the commencement of the Act.

In *S Kameswaramma* v *Subramanyam*[1], the plaintiff's husband had died in the year 1916, and the plaintiff had entered into a compromise in 1924 fixing her maintenance at Rs 240 per year and providing that the rate of maintenance shall not be increased or reduced. The question arose whether in spite of this agreement the plaintiff could claim increased maintenance in view of section 25 of the Hindu Adoptions and Maintenance Act, 1956 It was held that in spite of the aforesaid term of the compromise she was entitled to claim increased maintenance under section 25. This conclusion follows from the plain words of section 25, under which the amount of maintenance whether fixed by decree or agreement either before or after the commencement of the Act may be altered subsequently. The decision was, therefore, plainly right. No doubt, there are broad observations in that case to the effect that the right to maintenance is a recurring right and the liability to maintenance after the Act came into force is imposed by section 22, and there is no reason to exclude widows of persons who died before the Act from the operation of section 22. Those observations were not necessary for the purpose of that case, because the widow in that case was clearly entitled to maintenance from the estate of her deceased husband dying in 1916 under the Hindu law, as it stood then, independently, of section 21 and 22 of the Act, and in spite of the compromise fixing the maintenance before the commencement of the Act, the widow could in view of section 25 claim alteration of the amount of the maintenance. The decision cannot be regarded as an authority for the proposition that sections 21 and 22 of the Act affect rights, already vested before the commencement of the Act. We, therefore, hold that the claim of the respondent to maintenance for their lives is not affected by the Act.

We see no reason to interfere with the concurrent finding of the Courts below with regard to the quantum of maintenance.

In the result, the appeal is dismissed with costs.

K.S. *Appeal dismissed.*

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1. (1959) 1 An W R 12 . A I R. 1959 Andh Pra. 269

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—K. SUBBA RAO, J. R MUDHOLKAR, and R. S. BACHAWAT, JJ.

The State of Madras .. *Appellant**

v.

P. Govindarajulu Naidu .. *Respondent.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), *sections* 2(15), (16) *and* 3 —*Madras Estates Land Act (I of* 1908), *section* 3 (2) (e)—*Mothirambedu village in Madras State—If zamin estate or under-tenure estate—Notification under section* 3 *of Act XXVI of* 1948 *taking over the said estate as zamin estate—Validity*

In 1796 the then Collector of the Honourable Company's Jagheer granted a cowle to one *R*, who was occupying the office of a *Nattuvar* conferring on him the mirasi of Mothirambedu village in the Chingleput District in the State of Madras, subject to his paying all just dues At the time of the making of the permanent settlement in Chingleput District, which was then described as a Jagir, it was decided by the Company to maintain shrotriem, *i e*, grants made to *Nattuvars*, including those granted to *R*, and realise their dues through the instrumentality of the zamindar This policy was implemented by including the shrotriems in the zamindari by transferring the Company's ultimate reversionary rights to the zamindar The result was that the shrotriem tenure in the hands of the *Nattuvars* continued after the permanent settlement as it existed prior to it That is the reason why sometimes the village was described as zamin village and sometimes as Jari Inam village That is also why it was not the subject-matter of permanent inam settlement But the fact remains that shrotriem tenure continued in the hands of the *Nattuvar* and his successors-in-interest, after the permanent settlement as it was before the said settlement The tenure under the Government became an under-tenure under the zamindar, as the zamindar intervened between the Government and the *Nattuvar* Thus as the Mothirambedu village is held under a permanent under-tenure, it falls squarely under the definition of section 3 (2) (*e*) of the Madras Estates Land Act and is therefore an estate thereunder and hence it is an under-tenure estate As the under-tenure estate is excluded from the definition of "zamin estate", the notification issued under section 3 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, by the Government of Madras taking over the Mothirambedu village as a zamin estate is illegal and void.

Appeal from the Judgment and Decree, dated the 9th September, 1958, of the Madras High Court in Appeal Suit No. 85 of 1956.†

A. Ranganadham Chetty, Senior Advocate, (*A. V Rangam*, Advocate, with him), for Appellant.

T. V R. Tatachari, Advocate, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J—This appeal by certificate raises the question whether the village of Mothirambedu is a zamindari estate under the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 (Madras Act XXVI of 1948), hereinafter called the Act

The facts may be briefly stated. Mothirambedu village is one of the shrotriem villages in the Chingleput District in the State of Madras. The respondent purchased the same from one P Ananthapadmanabacharlu under a sale deed, dated 10th July, 1946, for a sum of Rs 26,000, and was in possession and enjoyment thereof. On 12th December, 1950, the Government of Madras issued a notification under section 3 of the Act taking over the said village as a zamin estate. The Government took possession of the same on 3rd January, 1951. On 15th

*C A No 446 of 1963 23rd September, 1965.

† (1959) 1 M L J 323.

March, 1954, the respondent filed O S. No. 22 of 1954 in the Court of the Subordinate Judge, Chingleput, against the State of Madras for a declaration that the said notification of his village as zamindari estate under the said Act was illegal and void. In the plaint he claimed that the said village was not an "estate" within the meaning of the Madras Estates Land Act and, therefore, it did not vest in the State. But that plea was subsequently given up and nothing need be said in that regard The State filed a written-statement asserting that the said village formed part of Tirumazhy Zamindari, that it was separately registered in the office of the Collector and that, therefore, it was a zamin estate within the meaning of the said Act.

The learned Subordinate Judge, Chingleput, held that the suit village was a zamin estate and that, therefore, the said notification was legal and binding on the respondent On appeal, the High Court of Judicature at Madras held that it was not proved that the said village was a zamin village, but it was a whole inam village. On that finding, it granted the plaintiff a declaration that the notification of the said village as a zamin estate under the Act was illegal and void, as the said village was a whole inam village. Hence the appeal.

Learned Counsel for the State contended that the said village was included in the assets of the zamindari at the time of the permanent settlement, that it continued to be a part of the said estate till it was abolished under the Act.

Mr. T. V. R. Tatachary, learned Counsel for the respondent, on the other hand, argued that the said village was granted as a strotriem before the permanent settlement to a person holding the office of a *Nattuvai*, that though the said village was included in the assets of the zamindari, the pre existing tenure was not disturbed, and that the grantee and his successors continued to hold the village as an under-tenure from the zamindar, as by reason of the permanent settlement the zamindar became an intermediary. In short, his contention was that the said village was an under-tenure estate falling under section 3 (2) (*e*) of the Madras Estates Land Act and that in any view, it had not been established that it was a zamin village.

Before we advert to the facts of the case it will be convenient to notice some of the aspects of law relevant to the said facts

The Madras Estates Land Act, 1908

Section 3 (2) " Estate " means—

(*a*) any permanently settled estate or temporarily settled zamindari,

(*b*) any portion of such permanently settled estate or temporarily settled zamindari which is separately registered in the office of the Collector ,

(*c*) * * * *

(*d*) (*As it stood before the Amending Act XVIII of* 1936)

any village of which the land revenue alone has been granted in inam to a person not owning the kudiwaram thereof, provided that the grant has been made, confirmed or recognized by the British Government or any separated part of a village

(*After the Amending Act XVIII of* 1936)

any inam village of which the grant has been made, confirmed or recognized by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees

(*e*) any portion consisting of one or more villages of any of the estates specified in clauses (*a*), (*b*) and (*c*) which is held on a permanent under-tenure

The Act

Section 2 (3) "estate" means a zamindari or an under-tenure or an inam estate

(7) "inam estate" means an estate within the meaning of section 3, clause (2) (*d*), of the Estates Land Act, but does not include an inam village which became an estate by virtue of the Madras Estates Land (Third Amendment) Act, 1936

* * * * *

(15) "under-tenure estate" means an estate within the meaning of section 3, clause (2) (*e*) of the Estates Land Act.

* * * * *

(16) "zamindari estate" means—

(i) an estate within the meaning of section 3, clause (2) (*a*), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause 2 (*b*) or 2 (*e*) of that Act; or

(ii) an estate within the meaning of section 3, clause 2 (*b*) or 2 (*c*), of the Estates Land Act, after excluding therefrom every portion which is itself an estate under section 3, clause 2 (*e*) of that Act

The aforesaid provisions may be summarized thus: The Madras Estates Land Act recognizes for the purpose of that Act 5 categories of estates The Act grouped the said 5 estates under three categories, namely, zamin, under-tenure and inam estates The estates defined in clauses (*a*), (*b*) and (*c*) of section 3 (2) of the Madras Estates Land Act, excluding therefrom an under-tenure estate, are classified as zamin estates An estate falling under the definition in section 3 (2) (*d*) of the Madras Estates Land Act, excluding therefrom an inam estate which became an estate under the Madras Estates (Third Amendment) Act, 1936, is described as an inam estate under the Act. An estate under the definition of section 3 (2) (*e*) of the Estates Land Act is brought under the definition of the "under-tenure estate" under the Act It will be noticed at this stage that though a village is physically a part of a zamindari if it is held on a permanent under-tenure, it is excluded from the definition of a zamin estate but included under the definition of an "under-tenure estate". The result of this classification is, an inam village held under a permanent under-tenure is not a zamin estate A village can be held under a permanent under-tenure whether that village was the subject-matter of a pre-settlement grant or a post-settlement grant To illustrate: take a village which was granted permanently to an inamdar before 1802 by the British Government At the time of the permanent settlement the said village was included in the permanently settled estate The effect of that was that the inamdar who was holding the village under the Government continued to hold the same under the proprietor. Take another illustration after the permanent settlement the proprietor made a permanent grant of the whole inam village to an inamdar. The inamdar held the village under the zamindar. In either case the village was held under the proprietor of the permanently settled estate The proprietor, who is liable to pay *peish kush* to the Government, is the tenure-holder. He is the intermediary between the inamdar and the Government, that is why the inamdar is described as under-tenure holder. It is, therefore, clear that to constitute an under-tenure it is not material whether the grant was a pre-settlement or a post-settlement one, but what is important is, in whom the reversionary interest rests That reversionary interest may rest in the proprietor either because at the permanent settlement the inam was included in the assets of the zamindari or because he himself was the grantor of a permanent under-tenure This aspect of the law was considered in two decisions of the Madras High Court Where a pre-settlement Mokhasa village was included in the assets of the zamindari it was held that the village was held under a permanent under-tenure within the meaning of section 3 (2) (*e*) of the Madras Estates Land Act: see *Gopisetti Veeraswami* v. *Sagiraju Seetharama Kantayya* [1], and *Narayanaswami Bahadur* v. *Boda Thammayya* [2]. This legal position will be material when we consider the documents filed in this case.

It may be mentioned that the distinction between "zamin estate", "inam estate" and "under-tenure estate" made under the Act is relevant, *inter alia*, for the purpose of payment of compensation. The basis on which compensation payable in respect of an inam estate is to be calculated would yield a larger measure of compensation than that in respect of a

1. (1926) 51 M L J 391 2 (1930) M W N 945

zamin estate In regard to an under-tenure estate, if the under-tenure was created prior to the permanent settlement, the compensation payable would be on the basis adopted for zamin estate with certain deductions; if it was created subsequent to the permanent settlement, the compensation would be on the basis adopted for a zamin estate. In the present case, as the inam was created prior to the permanent settlement, if the contention of the respondent was correct, he would get a higher compensation. That is the reason for this dispute (*See* sections 27, 28, 31, 32, 35, 36 and 37 of the Act)

It will also be useful to know, as we said for appreciating the evidence, who is a *Nattuvar*. *Nattuvar* or *Natwar* is described in the Manual of Chingleput District thus, at p. 244:

" The first and highest officer was the " Natwar" or headman of a Nadu, or circle of villages, the cultivation of which he supervised on the part of the Government These officers were possessed of considerable privileges, and were men of great dignity and reputed wealth They appear to have been lost sight of after the territory was made over to the British The Nabob recognised or ignored them, deprived them of their offices, or restored to them their privileges, as they resisted or fell in with his exactions, or as his rapacity was sharpened by the urgency of his necessities Such a system had demoralized what was really a very useful body of men, who were, moreover, eager to be relieved from the consequences of the ascendency of the dubashes, which had reduced them to the condition of ordinary ryots Mr Place took advantage of the disposition they now showed to return to the discharge of their duties, to which he therefore restored them under certain guarantees for their good behaviour "

" 'The Natwars' were a very ancient body of officials". It will be seen from the said extract that the office of *Nattuvar* was an important one, that it possessed of considerable privileges, that it fell into evil days during the period of the Nawabs, and that during the British rule Mr. Place, the then Collector of Chingleput, restored the office of *Nattuvar* under certain guarantees for the good behaviour of the *Nattuvars*. It appears that at the time of permanent settlement in the Chingleput District, which was then described as a Jagir, the office of *Nattuvar* was abolished but the *Nattuvars* were allowed to retain the shrotriem villages granted to them. This will appear from the Appendices to the Report of the Estates Land Committee, at pp. 228 to 253. Learned Counsel for both the parties agreed that the extracts given in the Statement of Case of the respondent are correct As the report is not available to us, we cite the extracts from the said Statement of Case.

Paragraph 66 *of the said Appendices*:

" The permanent settlement of the land revenue having rendered unnecessary, all the subordinate officers of revenue between the Collectors and the Curnums, the general instructions directed that those superfluous offices including that of Nattuvar should be abolished The nature of the powers exercised under the duties attached to that office furnish abundant reason for annulling it ; but the individual persons now holding it have claim to indulgence, and it is our duty to submit their pretensions to your Lordship's consideration . . . .
They have been considered to be honorable stations and length of possession has annexed to them the idea of property although the emoluments of an office ought under ordinary circumstances to cease with the discontinuance of the office itself, yet it will be just under stated consideration, to grant a compensation in the case of the Nattawars adequate to the loss sustained by the immediate incumbents. We recommend that your Lordship in Council should confer on them, as an act of indulgence, the possession of their Shrotriem lands tenable under a Purwanah of Government "

Paragraph 67 —Although the Nattuwars who were appointed under the authority of Government during Mr Place's management of the Jagheer cannot plead length of service, we yet recommend that they might be included in this arrangement in consideration of the assistance rendered by them in the lease of the lands at that period of time

Paragraph 74 —The Shrotriem lands in general are so connected with the Government lands that it has been deemed expedient to provide for the collection of the shrotriem rent through the channel of the proprietor of the estate in which the shrotriem lands are situated and to provide through the same channel for the collection of the commuted marahs The Zamindars will, therefore, be entitled (according to usage) subject always to prosecution for the abuse of it to call in the aid of the inhabitants of the shrotriem lands for purposes for which it has been customary to render such assistance "

The following extracts from the Minutes of Consultation in the Revenue Department, dated April 13, 1802, may be useful:

"The subject of the Nauttawars is familiar to the Board The nature of the office and its connection with the administration of the Revenue has been discussed at length on the records of the Government A reference to this discussion must demonstrate that the office can no longer be useful. The superior advantages which the Nauttawars have acquired by the enjoyment of the high warum and of maumams, and the ground of interference which they are calculated to afford with the rights of the proprietor, render it expedientthat the motives of such an influence should be removed together with the office The Board, therefore, authorise the abolition of the office of Nauttawar and the resumption of the emoluments attached to the performance of the duties of that office

At the period, however, of conferring such extensive benefit on the body of people as they will receive from the establishment of a system of permanent revenue and of judicature, the Board are disposed favourably to consider the claims of the present incumbents in the office of Nauttawar They concur with the Commission that it will be just, under the stated circumstances, to continue to the Nauttawars their Shrotriem lands, because they have been considered to be honourable stations and length of possession has annexed to them idea of property"

It will be seen from the said extracts that the Commission appointed to go into the question of the abolition of the office of *Nattuvars* recommended that the office should be abolished but the Government should confer on the incumbents the possession of their shortriem lands under a *purvana* The Revenue Board accepted the recommendation of the Commission; it agreed to allow the *Nattuvars* to continue to have possession of their shrotriem lands It is, therefore, clear that the shrotriem lands were given permanently to *Nattuvars* by the State, that at the time of permanent settlement the tenure was continued and that their inclusion in the estate only effected a transfer of the reversionary interest from the State to the Proprietor.

With this background let us look at the documents filed in the case. The earliest document on record is Exhibit 7, the certified copy of cowle granted by Mr Lionel Place, Collector of Honorable Company's Jageer to Rangasami Mudali, dated December 10, 1796. As it is an important document, we shall read it:

"Cowle granted by Lionel Place Esq , Collector of the Honourable Company's Jagheer to Rangaswamy Moodaly.

Whereas the villages of Moderambedu and Madavapoondy in the district of Poonamalle from neglect and want of mirasdars being in a desolate and uncultivated state producing nothing to the circar, Rangaswamy Mudaly Nautawar of the said district having agreed, provided the meerassee of the said villages be conferred on him, to clear and render them productive.

I do therefore hereby confer on Rangaswamy Mudaly and his heirs the meerassee of the said villages, to continue in the enjoyment of the same, so long as they carry on a proper cultivation, pay all just dues, and are obedient to the circar

Dated this 10th day of December in the year one thousand seven hundred and ninetysix.

(signed) Lional Place, Collector"

The genuineness of this document is not in question It was filed by consent. This document discloses that Rangaswamy Mudali was a *Nattuvar* in the District of Poonamalle. As the village of Mothirambedu, with which we are now concerned, was in a "desolate and uncultivated state" for want of mirasdar, the mirasi of the said village was granted permanently to Rangaswami Mudali and his heirs. In Wilson's Glossary, the following meaning to the Tamil expression "mirasi" is given:

"Inheritance, inherited property or right , the term is used, especially in the south of India, to signify lands held by absolute hereditary proprietorship under one of three contingencies"

According to Wilson, mirasdar means the holder of hereditary lands or office in a village. It is, therefore, clear that under this document the said village of Mothirambedu was given to Rangaswami Mudali, who was a village officer, in absolute hereditary proprietorship The village was given under a permanent hereditary grant, subject to, *inter alia,* the grantee paying all just dues to the Government. This document is couched in clear and unambiguous terms and

under it the permanent inam was granted to Rangaswamy Mudali subject to his payment of dues

Exhibit B-2 is described as "Trimishy Zamindari Statement" in regard to waste and unproductive lands. It is not dated. It relates to Mothirambedu village and another village Under the heading "remarks", the following statements are found:

"Watered by Trimishy tank, New Strotriem to Nautyavalappa Mooduly proposed to be resumed as per Order of the Board, dated 2nd October, 1800 Another village Alatoor is included with these two and the rent is paid on the whole and the villages are watered by the Trimishy tank Rented for 10 years to Naut Rangaswamy Moodaly 5 of which are expired The rent raised from 10 pagodas the present Fasli to 25 Pagodas the last year by the lease Watered by the Trimashe tank"

Learned Counsel for the State contends that this document shows that Exhibit A-7 was not given to and that Rangaswamy Mudali was only a lessee for 10 years. As we have stated earlier, this statement does not bear any date, though the internal evidence discloses that it came into existence after 2nd October, 1800. This is not signed by any officer We do not know on what material the said observations were made and on what occasion this document was prepared and by whom and whether this was acted upon at the time of permanent settlement. We cannot draw any presumption on an unsigned statement which does not even bear a date. This must, therefore, be ignored

Exhibit B-1 is the copy of the Kabuliat executed by Venkiah, the proprietor of the zamindari of Tirumishi at the time of a permanent settlemant of the estate in his favour The sannad is not produced It shows that the zamindari consisted of 57 purchased villages and 8 Shrotriem villages, but the names of the Shrotriem villages are not given. This document *ex facie* does not show that Mothirambedu was one of the villages that were the subject-matter of permanent settlement. The learned Counsel for the State relied upon the Chingleput Manual wherein a statement showing the particulars of several tenures other than ryotwari in the District of Chingleput is given. Dealing with Saidapet Taluk under the heading "Zamindaries". Mothirambedu village is mentioned, and under the heading "inam villages, enfranchised or unenfranchised," the said village is not shown. From this it is contended that this village was a part of the zamindari and that it must have been one of the shortriem villages shown as included in the zamindari of Tirumishi in the Kabuliat executed by Venkiah. Be that as it may, the fact that Shrotriem villages have been shown as villages of the zamindari is not decisive in the context of the Act, as permanent under-tenure villages, as explained earlier, have been specifically excluded from the definition of zamin estate.

Exhibit B-3 does not bear any date. It contains the names of the zamindars in the Madras Presidency. We do not know for what purpose this document was prepared. Under the heading "names of estates", Mothirambedu is given. The name of P. Ananthapadmanaban is shown under the heading "Name of the present holder." Apart from the heading, the expression "estate" is appropriate in the context of a zamindari as well as a village held under a permanent under-tenure. The honorific title "zamindar" adopted by a particular inamdar does not make him a zamindar and his land does not cease to be an inam It is either an inam or not under the provisions of the Act.

Exhibits B-4 and B-5 are the extracts from the Inam Fair Register of the year 1862 in respect Mothirambedu village. They deal with some minor inams of small extents. It may be mentioned at this stage that these registers were prepared in connection with the inam settlement They deal with pre-settlement inams only, which were not included in the assets of the zamindari Presumably these minor inams in Mothirambedu village were pre-settlement inams not so included and, therefore, they were the subject matter of the enquiry and were eventually confirmed. But it is said that the fact that the minor inams were the

subject-matter of the settlement but the village itself was not settled thereunder indicates that the village was a part of the zamindari. But, as we have pointed out earlier, the village, subject to the subsisting tenure, was included in the zamindari and therefore, there was no scope nor occasion for its being the subject-matter of inam settlement.

Exhibit A-2 is the title-deed granted to Narasimhachariar and 7 others by the Inam Commissioner, Madras, dated 24th November, 1869. The title deed was issued to Narasimhachariar in respect of 2 acres and 39 cents of wet land pursuant to orders made in the Inam Register But the said 2 acres and 39 cents of wet land is described as situated in the Jari Inam village of Mothirambedu taluk of Saidapet District. According to Wilson's Glossary, "Jari Inam" means "A grant of land or other endowment still in force, not resumed." This recital, therefore, supports the conclusion that the inam of the village of Mothirambedu taluk was still subsisting, though the right of ultimate reversion vested in the zamindar

Exhibit B-6 is "B" Register of Sriperumbudur Taluk of Chingleput District It contains a list of then inam villages. Mothirambedu minor inam is shown in the list as it should be. Mothirambedu village has no place in that list as it was included in the zamindari.

The respondent placed before the Court various sale deeds to support his title to the said village. Under Exhibit A-6, a sale-deed dated, 2nd September, 1919, Haji Usman Sahib sold the exclusive miras of Mothirambedu to Rangachariar. In the sale deed Mothirambedu is described in different places as Miras Mitta, Zamin village, Mothirambedu Zamin village, and Mothirambedu Ega Bhoga Miras zamin "Ega Bhogam" means in Tamil possession or tenure of village land by one person or family without any co-sharer No doubt the word "zamin" is ordinarily used to denote the estate of zamindar, that is the proprietor under the permanent settlement But the expression "zamindar" is also adopted by some of the inamdars as an honorific term A mere popular description of an under-tenure village as a zamin does not make it a zamin estate under the Act, if it is not one in fact Indeed, the document shows that in some parts, for instance in Schedule A Mothirambedu has been described as Ega Bhoga Miras Mothirambedu zamin village and in Schedule B, Melmanambedu village is described as Shrotriem Melmanambedu village, whereas in the preamble to the document Mothirambedu is described as Miras of Mothirambedu, and Melmanambedu, as Zamin Melmanambedu This shows that the character of the village has not been described with any legal precision. What is more, the character of this village was in dispute in a suit between the zamindar and the tenants in the year 1921. That suit ultimately went up to the High Court and a Division Bench of the Madras High Court disposed of the appeal on 23rd November, 1927 The judgment is marked as a Exhibit A-4 Therein the High Court pointed out that the zamindar, who was the appellant, did not produce the sannad nor did he file any old records relating to the zamindari on the ground that they were not available in the Collector's office. The only evidence adduced to support his contention was the fact that in regard to the village fixed assessment was paid from the year 1856 onwards, and that it was referred to in certain Government registers as zamin village. The High Court accepted the finding of the Subordinate Judge that it was not a part of the zamindari Except the certified copy of the Kabuliat executed by Venkiah, the then zamindar, which does not include this village and the unsigned statement alleged to have been filed in the permanent settlement proceedings, which is not proved, no further material evidence has been placed in the present proceedings We do not see any justification to take a different view from that accepted by the High Court in the year 1927.

From the discussion of the aforesaid evidence, the following facts emerge In 1796 Mr. Lionel Place, the then Collector of the Honourable Company's Jagheer, granted a cowle to Rangaswamy Mudali, who was occupying the office of a *Nattuvar*,

conferring on him the mirasi of Mothirambedu village and another village permanently, subject to his paying all just dues. At the time of the making of the permanent settlement in Chingleput District, which was then described as a Jagir, it was decided by the Company to maintain Shrotriem, *i.e.*, grants made to *Nattuvars* including those granted by Mr. Lionel Place, and realise their dues through the instrumentality of the zamindar. This policy was implemented by including the shrotriems in the zamindari by transferring the Company's ultimate reversionary rights to the zamindar. The result was that the shrotriem tenure in the hands of the *Nattuvars* continued after the permanent settlement as it existed prior to it. That is the reason why sometimes the village was described as zamin village and sometimes as Jari Inam village. That is also why it was not the subject-matter of permanent inam settlement. But the fact remains that Shrotriem tenure continued in the hands of the *Nattuvar* and his successors-in-interest, after the permanent-settlement as it was before the said settlement. The tenure under the Government became an under-tenure under the zamindar, as the zamindar intervened between the Government and the *Nattuvar*. As the village is held under a permanent under-tenure, it falls squarely under the definition of section 3 (2) (*e*) of the Madras Estates Land Act and is therefore, an estate thereunder and hence it is an under-tenure estate. As the under-tenure estate is excluded from the definition of "zamin estate", the notification issued by the Government on the basis that it is a zamin estate is void and the High Court rightly declared it as void.

In the result, the appeal fails and is dismissed with costs.

V. K. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A. K. SARKAR, RAGHUBAR DAYAL, and V. RAMASWAMI, JJ.

Biram Prakash and others. .. *Appellants**

v.

Narendra Dass and others. .. *Respondents.*

Math—Expenses of suit by the rightful claimant to Gaddi—Binding on the Math and its properties—Mortgage by the Mathadhipati to secure payment of such debts—Alienation of properties to salvage a part of the property sold under the sale in execution of the mortgage decree—Legal necessity—Test of.

In the instant appeal by Special Leave the appellants raised the following contentions: (i) the Hardwar Dharmashala was a separate endowment from the Gaddi Shanter Shah, (ii) that mortgage of 1933 was not for a binding debt, (iii) that the sale of major portion of the Dharmashala in 1945 was not supported by legal necessity.

Held, in view of the evidence on record (discussed in the judgment) the concurrent finding of the Courts below, that the Hardwar Dharmashala was not a separate endowment but was part of the Gaddi Shanter Shah, has to be accepted.

Where a lawful Mathadhipati is kept out of the endowed property by a trespasser asserting a hostile claim, there is a hostile title in the litigation against the Math itself. In the litigations suits Nos. 135 of 1915 and 70 of 1925 the expenses incurred by the successful Heads of the Math must be held to have been incurred in repelling a hostile attack on the trust property. This is also borne out by the circumstance that none of the succeeding Mahants challenged the mortgage of 1933 as also the other circumstance that the Akhara the high command of the Udasi sect proceeded on the basis that the cost of litigation was a legitimate charge on the properties. The mortgage transaction of 1933 executed by Saheb Dass the Mahant is supported by legal necessity.

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*C.A. No. 456 of 1963. 6th October, 1965.

In testing the legal necessity of the impugned transaction of sale, regard must be paid to the actual pressure on the estate, the immediate danger to be averted or the benefit to be conferred upon the trust estate Judged by this test the sale of 14th June, 1945, in favour of respondents 3 and 4 was supported by legal necessity and was beneficial to the Gaddi of Shanter Shah, for otherwise the portion of the Dharmashala which was saved by the said sale would have been lost irrevocably to the trust

Case-law referred

Appeal by Special Leave from the Judgment and Decree, dated the 13th November, 1959, of the Allahabad High Court in First Appeal No 342 of 1948.

Purushottam Trikumdas and *Raghbir Singh,* Senior Advocates (*B. C. Misra,* Advocate, with them) for Appellants Nos. 1 and 2.

Gopinath Kunzru and *Raghbir Singh,* Senior Advocates, (*B. C. Misra,* Advocate, with them) for Appellants Nos. 3 and 4

A. V. Viswanatha Sastri, Senior Advocate, (*Naunit Lal,* Advocate, with him) for Respondents Nos. 3 and 4.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought by Special Leave on behalf of the plaintiffs from the judgment and decree of the High Court of Allahabad, dated 13th November, 1959, dismissing First Appeal No. 342 of 1948 arising out of the judgment and decree of the Civil Judge of Saharanpur, dated 6th September, 1948, in Suit No. 64 of 1945

This suit was brought by the appellants as representing the Udasi sect under Order 1, rule 8 of the Civil Procedure Code in respect of the 'Dharamshala' at Hardwar containing the Samadhi of Baba Bakhat Mal, founder of the Gaddi Shanter Shah which is located in Roorkee Teshil of Saharanpur District. The appellants prayed for a declaration that the Dharamshala was a wakf property and not transferable and that the sale-deed, dated 14th June, 1945, executed by respondents 1 and 2 in favour of respondents 3 and 4 was illegal and inoperative. It was alleged by the appellants that Dharamshala was not part of the Gaddi Shanter Shah but was a separate endowment and the Mahant of Gaddi Shanter Shah had no right to alienate practically the entire dharamshala and destroy the substratum of that endowment. It was stated that respondents 1 and 2 executed the sale-deed to set aside the auction sale of a major part of the Dharamshala in satisfaction of a mortgage decree in suit No 66 of 1935 obtained by Panchayati Akhara Kalan Kankhal on the basis of a mortgage deed, dated 1st June, 1933, executed by Mahant Saheb Dass. It was also alleged that the mortgage deed to enforce which the decree was passed was not executed by Mahant Sahab Dass for legal necessity and the transaction was not binding on succeeding Mahants The suit was contested by the respondents on the ground that the Dharamshala at Hardwar was part of the Gaddi Shanter Shah and the mortgage deed executed by Saheb Dass, dated 1st June, 1933, was supported by pressing legal necessity and the sale-deed executed in favour of respondents 3 and 4 on 14th June, 1945, was binding upon the Gaddi of Shanter Shah It was stated on behalf the respondents that the decree in the mortgage suit being suit No 66 of 1935 created a binding debt against the Gaddi Shanter Shah and that the impugned sale-deed was executed in order to save the whole of the Dharamshala from passing out of the hands of the Mahant of Gaddi Shanter Shah and the impugned alienation was of a protective character and was for the benefit of the estate of the Mahant of Shanter Shah It was alleged on behalf of the respondents that the Samadhi of Baba Bakhat Mal and a substantial portion of the Dharamshala had been excluded from the sale-deed, dated 14th June, 1945 It was further alleged that the suit was barred by *res judicata* in view of the compromise in suit No 3 of 1943

Upon these rival contentions the Civil Judge of Saharanpur held that the Dharamshala at Hardwar was not a separate endowment but was part and parcel of Gaddi Shanter Shah. The Civil Judge also held that the sale-deed, dated 14th June, 1945, was legally valid as it was executed to discharge the decretal obligation created by the decree in suit No. 66 of 1935 and that the sale transaction was of a defensive character and was beneficial to the estate of the Gaddi Shanter Shah. It was accordingly held by the Civil Judge that the sale-deed, dated 14th June, 1945, was executed for legal necessity and for adequate consideration The Civil Judge also found that the suit was barred by section 11 of the Civil Procedure Code on account of the compromise decree in suit No. 3 of 1943. The Civil Judge accordingly dismissed the suit. Against the judgment and decree of the Civil Judge the plaintiffs preferred First Appeal No. 342 of 1948 in the Allahabad High Court which dismissed the appeal by its judgment and decree, dated 13th November, 1959. The High Court confirmed the finding of the Civil Judge that the Dharamshala was not a separate endowment but was part and parcel of the Gaddi Shanter Shah The High Court also took the view that the sale-deed of 14th June, 1945, was justified by legal necessity and was, therefore, legally valid. The High Court, however, differed from the trial Court on the question of *res judicata* and held that the decision in suit No. 3 of 1943 did not operate as *res judicata* in the present suit.

In support of this appeal Mr. Purshottam Tricumdas contended, in the first place, that the Dharamshala at Hardwar was a separate endowment from the Math of Shanter Shah and the Mahant of Shanter Shah could not alienate the major part of the Dharamshala and destroy the substratum of that separate endowment We do not think there is any warrant for accepting this argument. Both the lower Courts have concurrently found that the Dharamshala at Hardwar was not independent of the endowment of Gaddi Shanter Shah but that it was only a part of the property of the Mahant of Shanter Shah. In our opinion, the finding of the lower Courts is supported by adequate evidence. It is the admitted position that Baba Bakhat Mal was the founder of Gaddi Shanter Shah which was a Math intended for the initiation of disciples into the mysteries of the Udasi cult and for imparting spiritual knowledge of the Udasi cult Exhibit 14 is copy of a proceeding under Act II of 1819 and Act III of 1838. In the course of this proceeding Sant Das of Shanter Shah Math stated that

> " there was a dharamshala at Hardwar where all the Sadhus who came there from the Punjab, east and south were given food, and that anybody who happened to come to Shanter Shah was given bread and flour "

It is also stated in the proceeding that the village of Shanter Shah had been "a chartered muafi" since the time of Emperor Mohd. Shah and that

> "the petitioner who was about 75 years old, was in the sixth generation from the original donee"

and that

> " the produce of the village was spent over Sadhabarat and feeding the Faqirs of whom about 50 were then present at Mauza Shanter Shah and Hardwar, and those who came from day to day were all fed and that a very large number of Faqirs visit the place during the mela at Hardwar "

It is further stated that

> "in the book of Muafi, Mohammad Shah Badshah is recorded as donor and Mahant Sajanand and Sadanand are recorded as donees "

and that

> " the possession of the Muafidars has been continuing and the person present in possession Ganga Das is their disciple and the produce of this village is spent towards the feeding of all the visiting Faqirs at Hardwar "

The document, Exhibit 14 indicates that there were sanads granted by Emperor Mohd Shah to the Mahant of the Shanter Shah Math for meeting the expensses over Sadabarat and feeding the Faqirs at the Dharamshalas at Hardwar

and Shanter Shah It is significant to note that the grant was made to the Mahant of Shanter Shah for the maintenance of both the Dharamshalas In this context it is important to notice that the feeding of disciples and travellers and ascetics is an integral part of the duties of a Mahant. This is apparent from the form of dedication of a math from the text of Varaha Purana quoted by Dr. Mukherjea in his treatise on Hindu Law of Religious and Charitable Trust, Second Edition, at page 32:

> "A Math should, by person having faith in the Sastras, be made three-storied or two-storied, consisting of different apartments, accommodated with places for meditation, for study, for burnt offering to consecrated fire and the like And he should endow a village or sufficient land for meeting the expenses, so that the ascetics and the travellers getting shelter (there), may receive sandals, shoes, umbrellas, small pieces of cloth, and also other necessary things. Thus having established an asylum beneficial to persons practising austerities, and also to other poor people seeking shelter, he should declare—' I am endowing this asylum—May he who is the support of the universe be pleased with me.' "

It is established by the evidence in this case that the Dharamshalas at Hardwar and Shanter Shah and the property of Math of Shanter Shah have always been under one management and have always been dealt with together as one unit. In suit Nos. 135 of 1915 and 70 of 1925 the property of Gaddi Shanter Shah was the subject-matter of the claim between the rival parties and the whole property including the two Dharamshalas constituted the subject-matter of the litigation. In Civil Suit No. 135 of 1915 which was instituted by Sital Das against Saheb Das for recovery of possession of property of Gaddi Shanter Shah the whole Dharamshala at Hardwar was claimed and decreed as part of the Gaddi Shanter Shah and there was an express finding to that effect. In suit No. 70 of 1925 between Mahant Anand Prakash and Saheb Dass the Dharamshala at Hardwar was again claimed as part of the Gaddi Shanter Shah. Under the mortgage deed, dated 1st June, 1933, the Dharamshala was alienated as belonging to the Gaddi Shanter Shah and was sold as such in execution of the decree passed on the basis of the mortgage in suit No. 66 of 1935. In view of this evidence we are of opinion that both the lower Courts have rightly found that the Dharamshala at Hardwar was not a separate endowment but was a part and parcel of the Gaddi Shanter Shah. We are of the opinion that Mr. Purushottam Tricumdas has been unable to make good his submission on this aspect of the case.

We pass on to consider the next question in the case, *viz.*, whether the sale-deed, dated June 14, 1945, executed by respondents 1 and 2 in favour of respondents 3 and 4 is supported by legal necessity and is legally valid It is necessary at this stage to set out the relevant facts regarding the usufructuary mortgage, dated June 1, 1933 and the course of litigation ending with the sale of the portion of Dharamshala in favour of respondents 3 and 4 on June 14, 1945. Upon the death of Mahant Tulsi Das in 1914, a suit, No. 135 of 1915, was instituted by Mahant Sital Das for the Gaddi against Mahant Saheb Dass, when there was a dispute arising for the Gaddi. The decree, dated September 6, 1918, passed in that suit recognised the right of Sital Das to the post of Mahant On July 18, 1919, Sital Das executed a mortgage deed for Rs. 10,000 in favour of Panchaiti Akhara Kalan in respect of the money borrowed for the litigation The debt came to Rs. 30,825 on June 1, 1933. In the year 1923, after the death of Sital Das the dispute again arose between Saheb Das and Anand Prakash for the Gaddi. The suit No. 70 of 1925 filed by Anand Prakash against Saheb Das was decided in favour of the latter. Mahant Saheb Das had also borrowed from Panchaiti Akhara during that litigation. In order to discharge this debt and also the debt due under the mortgage deed, dated July 18, 1919, Mahant Saheb Das executed on June 1, 1933, a mortgage deed with possession of the Dharamshala for Rs. 61,000 but the room occupied by the Samadhi of Baba Bakhat Mal and two other rooms were excluded from the mortgage. On October 21, 1935, Mahant Saheb Das filed suit No. 66 of 1935 against the Akhara under section 33 of the U.P. Agriculturists Relief Act for rendition of account in respect of the mortgage of

1933, and on March 27, 1936, a compromise decree was passed in that suit for Rs 53,500 which was payable in 20 yearly instalments. As there was default in the payment of instalments, the mortgaged property was brought to sale and purchased in Court-auction by Panchaiti Akhara on November 17, 1942 The sale was confirmed on November 23, 1943, after an application made on February 6, 1943, by Pooran Das to set aside the execution sale was dismissed. The Panchaiti Akhara obtained possession of the property on November 23, 1943. In the meantime, on February 3, 1943, Narain Das and two others filed suit No. 3 of 1943 against the Akhara for a declaration that the Dharamshala was a wakf property and no right accrued to the Akhara through auction-sale and for a permanent injunction restraining the Akhara from taking proceedings for confirmation of sale. On December 4, 1944, Narendra Das filed an application for withdrawing himself from the suit as he had been appointed Mahant of the Gaddi in place of Pooran Das who was removed, and the prayer was granted by the Court. The other two plaintiffs made an application that the suit had been compromised and may be dismissed, and accordingly an order was passed on 7th December, 1944 In First Appeal No 163 of 1943 which was filed against the dismissal of the petition to set aside the sale, the High Court made an order that if the judgment-debtors deposited a sum of Rs. 1,50,300 in Court to the credit of the Akhara before 25th July, 1945, the sale would be set aside. The order was made by the High Court on 30th April, 1945. It appears that Mahant Pooran Das resigned the Gaddi of Shanter Shah and Narendra Das was installed as Mahant in his place. In the interest of the Gaddi Mahant Narendra Das appointed a committee of trustees to advise him in the management of the affairs of the trust. The committee of trustees was appointed in pursuance of an agreement, dated 27th July, 1944 The committee consisted of eight leading Mahants of the Udasi sect and the committee was constituted to safeguard the interest of the trust and to place the management of its affairs on a satisfactory basis. Afterthe High Court's order, dated 30th April, 1945, efforts were made by Mahant Narendra Das and the committee of trustees appointed by him to persuade the Akhara to take a smaller portion of the Dharamshala for the same amount, but their efforts were fruitless The committee of trustees and Mahant Narendra Das had meetings on 15th April, 1945 and 30th April, 1945, to consider the matter. After the Akhara refused the offer of the committee of trustees, respondents 3 and 4 were approached by the committee and were persuaded to take a much smaller portion of the building of Dharamshala for the same amount. It was in these circumstances that respondents 1 and 2 executed the sale-deed on 14th June, 1945, in favour of respondents 3 and 4 for the portion of the Dharamshala mentioned in that document for a consideration of Rs 1,50,300.

On behalf of the appellants it was contended by Mr Purshottam Tricumdas that the mortgage deed executed on 1st June, 1933, by Mahant Saheb Das was not supported by legal necessity because the suits of 1915 and 1925 were instituted against Saheb Das challenging his right to hold the office of Mahant which was merely a personal right. It was argued that the money borrowed for meeting legal expenses of such a case was not properly chargeable to Gaddi Shanter Shah because there was no question of vindication of the rights of the Math but that the suits were contested only for vindication of private and personal rights In support of this argument Mr. Purshottam Tricumdas referred to the decision in *Shri Sharada Peeth Math, Dwaraka* v. *Shri Rajrajeshvarashram*[1], but that decision was concerned with the question of limitation and has no bearing on the question presented for determination in the present case. It is true that there is a distinction between a suit to establish a claim to an office and a suit filed on behalf of an endowment as such to recover certain property which is claimed to belong to it, but in the present case the question is whether suit No. 135 of 1915 brought by Mahant Sital Das against Mahant Saheb Das and suit No. 70

1. A I R. 1933 Bom. 276.

of 1925 brought by Anand Prakash against Saheb Das were merely suits to establish the right of the plaintiffs to the Mahantship or whether they were suits to get the endowment property into the possession of persons who were the rightful Mahants The very object of a Math is to maintain a competent line of religious teachers for propagating and disseminating the religious doctrines of a particular order or sect In the eye of law there cannot be a Math without a lawfully appointed Mathadhipati as its spiritual head For the proper functioning of a Math it is also essential that the rightful Mahant should be in control and possession of the property belonging to the Math Where, therefore, a lawful Mathadhipati is kept out of the possession of the endowed property by a trespasser asserting a hostile claim, there is a hostile title asserted in the litigation against the Math itself In the litigation in suit No. 135 of 1915 filed by Sital Das the expenses incurred by the Mahant must therefore be held to have been incurred in repelling a hostile attack on the trust property Similarly, in suit No. 70 of 1925 filed by Anand Prakash against Saheb Das which was decided in favour of the latter, the expenses incurred by Mahant Saheb Das must be held to have been incurred in repelling a hostile attack on the trust property. This conclusion is also borne out by the circumstance that none of the succeeding Mahants challenged the validity of the mortgage transaction and by the other circumstance that the Akhara being the high command of the Udasi sect proceeded on the basis that the cost of the litigation was a legitimate charge on the Math properties Reference may be made in this context to the observations of the Judicial Committee in *Murugesam Pillai* v. *Manickavasaka Pandara*[1]:

> " The Board does not wish to cast any doubt upon the proposition that, in the case of mortgages granted over the security of an Adhinam or Math by the head thereof, it lies upon the mortgagee, or those in his right, to prove that the debt was a necessary expense of the institution itself But it is a circumstance of great weight when holder after holder of the headship recognizes and deals with the debt on that basis , and as time goes on this may itself come to be a not unimportant element of probation upon the issue It must also be fully borne in mind that with the lapse of time the parties to the transaction may die or disappear In the present case Pillai, the lender, is dead , Manickavasaka, the borrower, is also dead, and it is conceivable that, as years elapse, in such cases nearly all the material evidence may in the course of years disappear while the debt itself still remains, having from its initiation till almost the date of suit been recognized by all concerned as a debt truly constituted by the Adhinam In such cases a Court is much more easily satisfied that the debt was properly incurred than where the transaction was itself recent and can therefore be the subject of more exact evidence, or where the transaction, although remote, has been the subject of challenge or dispute by those charged with the interests of the institution "

We are accordingly of opinion that the mortgage deed, dated 1st June, 1933, executed by Saheb Das is supported by legal necessity It is equally manifest that the sale-deed, dated 14th June, 1945, in favour of respondents 3 and 4 executed to satisfy the mortgage decree obtained by the Akhara is supported by legal necessity and is a valid transaction. We accordingly reject the argument of Mr. Purshottam Tricumdas on this part of the case.

There is also an alternative ground upon which the validity of the sale-deed of June 14, 1945, can be supported It appears that on October 21, 1935, Mahant Saheb Das brought suit No. 66 of 1935 under section 33 of the U P. Agriculturists Relief Act in the Court of First Civil Judge, Saharanpur There was a compromise decree on March 27, 1936, by which the mortgagee—the Panchaiti Akhara was awarded a sum of Rs 53,500 and it was agreed that this amount will be paid in 20 annual instalments of Rs 4,000 each and the mortgaged property was to be sold in the event of default in payment of any of the instalments. There was default after payment of the first instalment by Mahant Pooran Das who succeeded to the Gaddi on the death of Saheb Das in 1936. The result was that the disputed Dharamshala was sold with the exception of the three rooms and was purchased by the Akhara Panchaiti Kalan on November 17, 1942, for Rs. 1,50,300. The Akhara Panchaiti Kalan took possession of property on 23rd November, 1945, but in the meantime Pooran Das filed an objection before the execution Court for

1 32 M L J 369, (1917) L R. 44 I A. 98 at 102: I L R, 40 Mad 402 (P.C).

setting aside of the sale on the ground of material irregularity under Order 21, rule 90, Civil Procedure Code The application was dismissed on 6th February, 1943. Pooran Das filed an appeal before the High Court against the order of the Civil Judge dismissing the application. Pooran Das thereafter applied to the High Court for permission to sell a part of the building for the amount for which almost the whole of the Dharmshala had been sold in favour of the Akhara. It appears that after the resignation of Mahant Pooran Das respondent No 1, Narendra Das succeeded him and that Narendra Das appointed a Committee of Trustees for the management of the Gaddi Shanter Shah. On 15th April, 1945, the trustees adopted a resolution that the Akhara Panchaiti Kalan should be approached to purchase a lesser portion of the Dhramshala for theamountfor which it had originally purchased almost the whole of the building. There was no response from the Akhara and therefore the Committee of Trustees resolved on 30th May, 1945, to negotiate a sale with respondents 3 and 4. Ultimately respondents 3 and 4 agreed to purchase a much smaller portion of the Dharamshala for the amount Rs. 1,50,300 payable to the Akhara. On 14th June, 1945, respondents 1 and 2 executed the sale-deedin favour of respondents 3 and 4 and they recited in the course of this document that the transaction was entered into in the interests of the Math because the entire building of the Dharamshala would be lost to the Math for ever if the transaction with respondents 3 and 4 was not concluded and the amount—Rs 1,50,300, was not deposited in the High Court within the time granted. It is recited in the sale-deed that by alienating a portion of the building for Rs. 1,50,300 in favour of respondents 3 and 4 a sufficient portion of the property would be saved for the gaddi and the gaddi will be benefited. In this state of facts it is clear that the sale-deed, dated 14th June, 1945, in favour of respondents 3 and 4 was supported by legal necessity, for otherwise the portion of the Dharamshala which was saved by means of the sale-deed would have been lost irrevocably to the trust.

In *Prosunno Kumari Debya* v. *Golab Chand Baboo*[1] it was observed by the Judicial Committee that notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is competent for a shebait to incur debts and borrow money for the service of the idol and preservation of its property, to the extent to which there is an existing necessity for so doing, his power in that respect being analogous to that possessed by the manager for an infant heir In *Hunooman Persahd Panday* v *Mussumat Babooee Munraj Koonweree*[2] Lord Justice Knight Bruce observed:

> " The power of the manager for an infant heir to charge an estate not hisown is, under the Hindu law, a limited and qualified power It can only be exercised rightly in a case of need or for the benefit of the estate But where, in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir grounded on a necessity which his own wrong has helped to cause Therefore the lender in this case, unless he is shewn to have acted *mala fide*, will not be affected, though it be shewn that with better management the estate might have been kept freefrom debt."

In *Niladri Sahu* v *Mahant Chaturbhuj Das*[3] the Mahant of a Math mortgaged certain of the endowed properties at 1 per cent. per mensem in order to discharge loans at 2 per cent per mensem which were an accumulating burden upon the endowment, he also covenanted personally to pay. The original loans had been incurred mainly for the purpose of constructing pakka buildings for the accommodation of wealthy devotees visiting the Math, and in part for the ordinary expenses of the worship In a suit to enforce the mortgage against the Mahant personally and against the mortgaged property, in which suit the Mahant failed either to give evidence or to produce the books of the Math it was held by the

1. (1875) L R 2 I A 145
2. (1854-57) 6 Moore's I A Case. 243.
3. 51 M L J 822: (1926) L R. 53 I.A. 253 : A.I R 1926 P C 112.

Judicial Committee that the mortgage was for necessity so as to be within the power of the Mahant, even if the original loans had been incurred recklessly and not for the benefit of the Math, which however was not shown to have been the case. At page 267 Lord Atkinson states:

" Even if the building scheme of the defendant had been reckless, inconsistent, unsound and liable to fail, which has not been proved, what drove him to borrow this money Rs 25,000 on mortgage, to pay old debts, and so be relieved of the oppressive burden which the exorbitant rate of interest at which these earlier loans were made imposed upon him ? It was the high rate of interest, which he was already bound to pay, that was the necessary and immediate cause of his giving this mortgage, though the remote cause of it was the getting into debt by the building operation In their Lordships' view the principle of the case abovementioned applies to this case "

In testing therefore, the question of legal necessity for the impugned transaction regard must be paid to the actual pressure on the estate, the immediate danger to be averted or the benefit to be conferred upon the trust estate Applying the test in the prssent case, we are satisfied that the transaction of sale, dated 14th June, 1945, in favour of respondents 3 and 4 was beneficial to the gaddi of Shanter Shah and the finding of the lower Courts on this point is correct.

On behalf of the respondents Nos. 3 and 4 Mr Viswanatha Sastri contended that the decision of the High Court on the issue of *res judicata* was not correct. We are, however, satisfied that the High Court was right in taking the view for the reasons given by it that the decision in suit No. 3 of 1943 did not operate as *res judicata.*

For these reasons we hold there is no merit in this appeal which is accordingly dismissed with costs.

K.G.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT:—K. SUBBA RAO, J. R. MUDHOLKAR AND R. S. BACHAWAT, JJ.

Gadde Venkateswara Rao .. *Appellant**

v.

Government of Andhra Pradesh and others .. *Respondents.*

Andhra Pradesh Panchayat Samithis and Zilla Parishads Act (XXXV of 1959), sections 62 and 72—Powers of Government under—Orders under not legally passed—Powers of High Court to issue writ quashing the latter illegal order.

Constitution of India (1950), Article 226—Discretion of High Court to issue writs under.

Under the auspices of the Block Development Committee, Chintalapudi, a 'Primary Health Centre' was inaugurated at Dharmajigudem village on 7th November, 1958 , but the conditions precedent not being fulfilled it could not be a permanent location With the concurrence, of the villagers of Dharmajigudem the villagers of Lingapalem through K V Krishna Rao complied with the conditions for location of the Centre thereat on 17th July, 1959 Thereafter the appellant, representing Dharmajigudem villagers, on 31st July, 1959, also complied with the requisites for locating the Centre in this village The Block Development Committee, after reviewing the previous history resolved to locate the Centre at Lingapalem and communicated the same to the Government which approved of the same All this was done on the administrative basis

The Panchayat Samithis and Zilla Parishads Act came into force in September, 1959 ; setting up of the Health Centre fell within the powers and functions of Chintalapudi Panchayat Samithi under section 18 of the Act read with the Schedule thereto and the matter was directed by the Government to be taken up by the Samithi The Samithi resolved at its meeting held on 28th May, 1960, that the Health Centre be located at Dharmajigudem and communicated the same to the Government The Goverment approved the proposal of the Samithi on 6th July, 1960 On 23rd January, 1961, Rules were framed under section 69 of the Act

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* C A No 755 of 1965. 11th October, 1965.

A representation was made to the Government that the meeting of the Panchayat Samithi held on 28th May, 1960, was irregular for want of proper notice but the Government decided not to act under section 72 Thereafter at a Special Meeting of the Samithi held on 12th May, 1961, the Samithi cancelled all the resolutions passed at the prior meeting At a subsequent meeting held on 29th May, 1961, the Samithi resolved to locate the Health Centre at Lingapalem and communicated the resolution to the Government

The Government made an order on 7th March, 1962, holding there was no valid reason for shifting the Centre from Dharmajigudem to Lingapalem and directing the Block Development Officer to take action accordingly. This order was made on the basis that the location once made permanent cannot be set aside later except by a two-thirds majority ; the Government later discovering that Dharmajigudem was only a temporary location reviewed its order of 1962 and passed a later order on 18th April, 1963, sanctioning the permanent location at Lingapalem.

The appellant, a representative of Dharmajigudem village filed a petition under Article 226 of the Constitution for quashing the later order of 1963 , it was heard by a single Judge who dismissed it On appeal the High Court confirmed the dismissal Hence the appeal to the Supreme Court.

The points arising for decision are · (i) whether the appellant had a personal right to maintain the writ petition , (ii) whether the orders of the Government, dated 7th March, 1962, was made under section 62 and valid , (iii) whether the order, dated 18th April, 1963, was void as the order under section 62 could not be reviewed under section 72 and it is also otherwise not legal.

Held, The petition under Article 226 is maintainable A personal right need not be a proprietary right ; it can also relate to the interest of a trustee The appellant is the reprsentative of a committee which was in law the trustees of the amount collected for a public purpose the Health Centre to be established He was certainly prejudiced by the order of 1963

Section 62 (1) of the Act empowers the Government, by order in writing, to cancel any resolution passed by a Panchayat Samithi, if that resolution is passed in excess or abuse of its powers under the Act etc. , but before taking action under the sub-section it should give notice to the Samithi concerned The order of 1962 was therefore passed under this provision No notice was given to the Samithi before taking action , the order is not therefore, one legally passed

Section 72 (1) confers a general power on the Government and on its terms if there were no other provision it can cancel a resolution of the Panchayat Samithi under this provision Even then notice has to be given to any party who might be prejudicially affected thereby , the proviso requires such notice.

Sub-section (3) of section 72 enables the Government to review its own order, *suo motu* or on application made to it if the order was passed under a mistake of fact or law, etc. Notice as provided for in the proviso to sub-section (1) is necessary for such a review Otherwise the order on review is not legal and valid Further this power to review its own order can be exercised only in respect of orders made under sub-section (1). It cannot be exercised in respect of orders under section 62

Therefore the order of the year 1963 is bad for two reasons, (i) it was passed without notice to the petitioner (appellant) who is affected prejudicially, (ii) it was in review of an order passed under section 62 of the Act.

The argument that the order of 1962 was not one passed under section 62 but one passed in the exercise of powers under the Rules which vests the power of deciding the location of the Centre in the Government in case of dispute cannot be accepted Section 18 confers the powers on the Samithi and not on the Government , and the power, if conferred by the Rules, is inconsistent with the provisions of the Act and so the Rules are bad.

If the order of 1963 is bad, it is bad in fact, and the High Court quashed that order it would have restored an illegal order, that of 7th March, 1962 The High Court has, therefore, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case

Appeal by Special Leave from the Judgment and Order, dated the 7th September, 1964 of the Andhra Pradesh High Court in Writ Appeal No 8 of 1964.

S. T Desai, Senior Advocate, (*N. V Suryanarayana Murthy*, *R Thiagarajan* and *K Jayaram*, Advocates, with him), for Appellant

P Ram Reddy and *A. V Rangam*, Advocates, for Respondent No 1.

S. V. Gupte, Solicitor-General of India (*A. V. V. Nair*, Advocate, with him), for Respondent No 4.

The Judgment of the Court was delivered by

Subba Rao, J—This is an appeal by Special Leave against the judgment of a Division Bench of the Andhra Pradesh High Court in a Letters Patent Appeal confirming that of a single Judge of that Court dismissing a petition filed by the appellant under Article 226 of the Constitution for issuing a writ of *certiorari* quashing the order of the Government of Andhra Pradesh, dated 18th April, 1963, under section 72 of the Andhra Pradesh Panchayat Samithis and Zilla Parishads Act, 1959 (XXXV of 1959) hereinafter called the Act.

At the outset it will be convenient to survey the facts leading up to this appeal in their chronological order. For the promotion of rural welfare, the Government of Andhra Pradesh initiated Community Development Programme in the said State Pursuant to that programme, each district in the State was divided into Blocks, called Community Development Blocks. Chintalapudi Taluk in the West Godavari District was one of such Blocks A Block Planning and Development Committee was appointed for each Block and a District Planning and Development Committee for each district. All this was done by the Government by issuing administrative directions, indeed, the said Committees were only advisory bodies and the ultimate power vested in the Government One of the activities of the said Committees was to constitute Primary Health Centres in each district On 22nd March, 1957, the Government of Andhra Pradesh issued a notification laying down broad principles for guidance in the selection of places for the location of Primary Health Centres. One of the said principles relevant to the present enquiry may be noticed at this stage and that is, the village selected for locating such Centre was expected to give 2 acres of site free and 50 per cent cash contribution which would not be less than Rs 10,000 On April 8, 1958, the Block Planning and Development Committee, Chintalapudi, resolved unanimously, modifying its earlier resolution, to have the Primary Health Centre at Dharmajigudem village, as there were High Schools and education facilities there. On 7th November, 1958, the Collector of the District formally inaugurated the Primary Health Centre at Dharmajigudem. On 11th July, 1959, the said Committee passed two resolutions, among others. Under resolution 3 it recorded with appreciation the donation of 50 cents. of land by Achyutharamaiah, the Block Committee Member, towards site for the Primary Health Centre to be located at Dharmajigudem and appealed to the members of the Block Committee to see to the remittance of the cash contribution of Rs. 10,000 immediately. Presumably because that something happened at the meeting immediately after the said resolution was passed indicating that there would be no response in that direction, another resolution was passed by the said Committee recording that, as the villagers of Dharmajigudem had failed to pay the said contribution for the last 8 months, the Primary Health Centre located in that place be shifted to and established permanently at any other suitable village where land and cash contributions were forthcoming. On 13th July, 1959, *i e.*, two days after the aforesaid resolution, the Block Development Officer wrote a letter to the appellant, who was the President of the Village Panchayat, informing him that he had not taken any steps for the realization of the contribution so far and that if the required contribution was not realized before the end of the month steps would be taken to shift the Primary Health Centre to some other place. It may be noticed at this stage that the Block Development Officer, who had to implement the resolution of the Committee, had outstepped his powers in writing a letter in derogarion of the terms of the resolution of the Committee dated 11th July, 1959 On 16th July, 1959, the appellant and others of Dharmajigudem informed the Block Development Officer that it was not possible for them to collect the amount and that there was no objection to the shifting of the Centre from their village to any other place On 11th July, 1959, the Block Development Officer wrote to the people of Dharmajigudem that as they were

unable to pay the said amount the said Centre would be shifted to Lingapalem. On 27th July, 1959, the 4th respondent, Rangarao, representing Lingapalem village, deposited Rs. 10,000 with the Block Development Committee and also donated two acres of land for the purpose of locating the said Centre in the said village On 31st July, 1959, on behalf of Dharmajigudem, Venkateswara Rao, the appellant, deposited the sum of Rs. 10,000 in the Sub-Treasury and K. V Krishna Rao donated 2 acres of land and delivered possession of the same to the Block Development Officer. On 14th August, 1959, the said Committee, after reveiwing the previous history of the location of the Primary Health Centre and after noticing that both the villages deposited the amonnt—one on 27th July, 1959 and the other on 31st July, 1959—and after considering the competing claims, resolved unanimously to have the Primary Health Centre located permanently at Lipgapalem and to request the authorities concerned to shift it from Dharmajigudem to Lingapalem at an early date. One important fact to be noticed in this resolution is that it was recorded therein that the representatives of Dharmajigudem assured the representatives of Lingapalem that they not only gave up their efforts to have the Primary Health Centre at Dharmajigudem but also unanimously agreed to have it located at Lingapalem. It was further recorded therein that the villagers of Lingapalem paid up the entire contribution enthusiastically and that too after obtaining the concurrence of the villagers of Dharmajigudem and also on an assurance that the latter gave up the idea of having the Primary Helth Centre at Dharmajigudem. It would, therefore, be noticed that this resolution for locating the Primary Health Centre at Lingapalem was passed after the representives of the two villages settled their disputes. On September 18, 1959, the Act came into forcc and under section 3 thereof a Panchayat Samithi was constituted for Chintalapudi On 7th January, 1960, the Government informed the Collector of West Godavari District that the question of shifting the Primary Health Centre from Dharmajigudem to Lingapalem should be left to the decision of the Panchayat Samithi constituted under the Act. The President of the Panchayat Samithi, Chintalapudi Block, was requested to place the resolution, dated 14th August, 1959, of the Block Planning and Development Committee before the Panchayat Samithi for reconsideration and submit a report to the Government through the Chairman, Zilla Parishad, West Godavari. It may be noticed that after the passing of the Act, what was being done administratively was sought to be placed on a statutory basis On 28th May, 1960, the Chintalapudi Panchayat Samithi held its meeting and resolved that the Primary Health Centre should be permanently located at Dharmajigudem, and the said resolution was communicated to the Government. On 6th July, 1960, the Government approved the proposal of the Chintalapudi Panchayat Samithi to locate the Primary Health Centre permanently at Dharmajigudem On 23rd January, 1961, the Rules framed by the Government in exercise of the powers conferred on it under section 69 of the Act came into force. On 22nd February, 1961, on a representation made to the Government that the meeting of the Panchayat Samithi held on 28th May, 1960, was irregular on the ground of inadequate notice, the Government decided not to interfere with those proceedings under section 72 of the Act On 12th May, 1961, the Panchayat Samithi at a special meeting, on the ground that the meeting held on 28th May, 1960, was not held in accordance with rule 4 (1) of the Rules for the conduct of business, in exercise of the power given to it under rule 15 thereof, cancelled all the resolutions passed by the meeting of the Samithi on 28th May, 1960. On 29th May, 1961, the Samithi passed another resolution adopting all the resolutions which it cancelled on 12th May, 1961, except the resolution to locate the Primary Health Centre at Dharmajigudem. In regard to the location of the said Centre it resolved to locate it at Lingapalem. On 7th March, 1962, the Government made an order holding that there was no valid reason for shifting the Primary Health Centre from Dharmajigudem to Lingapalem and directing the Block Development Officer to take action accordingly. The main reason given for that order was that the Primary Health Centre was already functioning at Dharmajigudem and a Health Centre once established should not be shifted to another place within the Block unless the Panchayat Samithi

resolved by two-thirds majority of the members present at the meeting as required under rule 7 of the Rules and that the resolution, dated 29th May, 1961, was not supported by the requisite majority On 18th April, 1963, *i.e*, about a year after the earlier order, the Government passed another order wherein it held that it passed the previous order, dated 7th March, 1962, on a mistaken impression that it was a case of shifting the Primary Health Centre from one place where it was permanently located to another, while the correct position was that in the instant case the Primary Health Centre was not permanently located by the Government and, therefore, the resolution passed by the Panchayat Samithi on 29th May, 1961, fell within rule 2 of the Rules and not under rule 7 thereof. In that view, it directed that the said Centre should be located permanently in Lingapalem village in accordance with the resolution of the Panchayat Samithi, dated 29th May, 1961.

A resume of the said facts leads to the following factual position Before the Act came into force, the Primary Health Centre was inaugurated at Dharmajigudem presumably subject to the condition that the said village would comply with the conditions laid down by the administrative directions governing the location of a Centre. One of the important conditions was that the village seeking to have the Centre should give 2 acres of land free and 5o per cent cash contribution which would not be less than Rs 10,000. The said amount was not paid by Dharmajigudem village with the result the condition was not complied with With the consent of the representatives of the village of Dharmajigudem, the Block Planning and Development Committee resolved to shift the Primary Health Centre from Dharmajigudem to Lingapalem. The Lingapalem village satisfied the conditions on 27th July, 1959 Thereafter, Dharmajigudem village also satisfied the said conditions on 31st July, 1959. On 14th August, 1959, the said Committee by a resolution decided to locate the Centre at Lingapalem, but the Government directed the matter to be decided by the Panchayat Samithi, as by that time the Act had come into force and the Panchayat Samithi for the Block had been established Though on 28th May, 1960, the Panchayat Samithi at first resolved to have the Centre at Dharmajigudem and though the said resolution was approved by the Government, the said Panchayat Samithi finally by its resolution, dated 29th May, 1961, cancelled its earlier resolution and resolved to locate the Centre at Lingapalem. On 7th March, 1962, under section 62 of the Act the said resolution of the Panchayat Samithi was set aside by the Government on the ground that it did not get the requisite support of two-thirds majority. But on 18th April, 1963, the Government reviewed its previous order, under section 72 of the Act, on the ground that the said order was made under a mistaken impression that the Primary Health Centre was permanently located at Dharmajigudem and directed the Centre to be located at Lingapalem. It will, therefore, be seen that though the Health Centre was formally inaugurated at Dharmajigudem before the Act came into force, there was not and could not have been a permanent location of the Centre at that place, as the condition precedent was not complied with After the Act came into force, though the Panchayat Samithi at first approved of the location of the Centre at Dharmajigudem, it cancelled the resolution and decided to locate it at Lingapalem The Government, on a misapprehension of fact, set aside that order, but when it came to know of the mistake it reviewed its earlier order and directed the location of the Centre at Lingapalem. The question is whether on these facts the Government had jurisdiction to make the order which it did in exercise of its powers under section 72 of the Act

The appellant, who was the representative of the village of Dharmajigudem in all the said proceedings, filed an application before the High Court under Article 226 of the Constitution for quashing the said order of the Government The said application was, in the first instance heard by a single Judge of the High Court and he dismissed it. On appeal, a Division Bench of the High Court confirmed it. Hence the appeal.

Mr Desai, learned Counsel for the appellant, raised before us the following points · (1) The order of the Government concerning the resolution, dated 29 May, 1961, was made under section 62 of the Act and, therefore, the said order could not be reviewed under section 72 thereof. (2) Assuming that the said order, dated 7th March, 1962, was made under section 72 (3) of the Act, the order, dated 18th April, 1963, reviewing the said order was invalid inasmuch as the pre-requisite for the exercise of the power of review thereunder, namely the existence of a mistake of fact or law or the ignorance of any material fact, was not satisfied (3) The order, dated 18th April, 1963, was also invalid, because it was made without giving an opportunity to the party prejudiced thereby of making a representation against the making of the said order.

Mr. Ram Reddi, learned Counsel for the State of Andhra Pradesh, raised a preliminary objection that the appellant had no personal right in the matter of the location of the Primary Health Centre and, therefore, he had no *locus standi* to file application under Article 226 of the Constitution. He argued that the order of the Government, dated 7th March, 1962, was not simply a cancellation of a resolution made by the Panchayat Samithi, but a composite order giving directions to the Block Development Officer and, therefore, it fell directly within the scope of section 72 of the Act; and, as the said order was made under a misapprehension that there was a permanent location of the Health Centre at Dharmajigudem, the Government had jurisdiction to review the same under section 72 (3) of the Act. He would further contend that if the order, dated 7th March, 1962, was passed under section 62 of the Act, the said order being an administrative one, the Government had jurisdiction to review the same under section 62 itself when the mistake was discovered or brought to its notice. In addition he raised before us a new point which was not argued either before the single Judge or, on appeal, before the Division Bench of the High Court He would say that the impugned order was neither made under section 62 nor under section 72 of the Act, but it was really passed under the relevant Rules made by the Government in exercise of the power conferred on it under section 69 of the Act, read with sub-section (2) of section 18 thereof, whereunder the ultimate authority under the Act to locate the Health Centre was the Government, though on the recommendation of the Panchayat Samithi. In this view, the argument proceeded, no question of review would arise at all, for the Government passed the final order in regard to the location of the Primary Health Centre at Lingapalem.

The learned Solicitor-General, appearing for the 4th respondent, supported Mr. Ram Reddi on all the points and further elaborated that aspect of the argument which related to the construction of the order made by the Government on 7th March, 1962

The first question is whether the appellant had *locus standi* to file a petition in the High Court under Article 226 of the Constitution. This Court in *The Calcutta Gas Company (Proprietary) Ltd.* v. *The State of West Bengal*[1], dealing with the question of *locus standi* of the appellant in that case to file a petition under Article 226 of the Constitution in the High Court, observed:

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose It is, therefore, clear that persons other than those claiming fundamental right can also approach the Court seeking a relief thereunder The Article in terms does not describe the classes of persons entitled to apply thereunder , but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right . The right that can be enforced under Article 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like *habeas corpus* or *quo warranto* this rule may have to be relaxed or modified "

Has the appellant a right to file the petition out of which the present appeal has arisen? The appellant is the President of the Panchayat Samithi of Dharmaji-

1 (1963) 1 S C J 106 1962 Supp (3) S C R 106.

gudem. The villagers of Dharmajigudem formed a committee with the appellant as President for the purpose of collecting contributions from the villagers for setting up the Primary Health Centre The said committee collected Rs 10,000 and deposited the same with the Block Development Officer The appellant represented the village in all its dealings with the Block Development Committee and the Panchayat Samithi in the matter of the location of the Primary Health Centre at Dharmajigudem. His conduct, the acquiescence on the part of the other members of the committee, and the treatment meted out to him by the authorities concerned support the inference that he was authorized to act on behalf of the committee The appellant was, therefore, a representative of the committee which was in law the trustees of the amounts collected by it from the villagers for a public purpose We have, therefore, no hesitation to hold that the appellant had the right to maintain the application under Article 226 of the Constitution This Court held in the decision cited *supra* that "ordinarily" the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest: it can also relate to an interest of a trustee. That apart, in exceptional cases, as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Article 226 of the Constitution at his instance is, therefore, maintainable.

Now, we shall first take the new argument advanced by Mr. Ram Reddy for the first time before us, for, if that was accepted, the appeal would fail. Briefly stated, his contention was that the order of the Government, dated 18th April, 1963, was not made either under section 62 or under section 72 of the Act, but was made only under the Rules made by the Government in exercise of its power under section 69 of the Act. To appreciate this contention it will be useful to notice the relevant rules.

Under rule 2, the Panchayat Samithi only recommends to the Government the place for locating the said Centre Under rule 3 (11), in the case of conflict between the relevant authorities in regard to the location of a Health Centre, the Government's order shall be final Under rule 6, a Primary Health Centre once established shall not ordinarily be shifted to another place except by the Government on the recommendation of the Panchayat Samithi on the basis of a resolution passed by it by two-thirds of the members of the Panchayat Samithi present at the meeting. Even in such a case the Government has no power to direct the shifting of a Primary Health Centre established in one place to another, if the contribution from the people had been accepted and is in deposit. It is clear from the said rules that the ultimate authority to locate the Primary Health Centre or to direct its shifting from one place to another is the Government. On the basis of the said rules, learned Counsel contended that the High Court missed the real point, presumably on the arguments advanced before it, and proceeded to consider the validity of the impugned order in terms of section 72 of the Act. The circumstance, the argument proceeded, that the Government in its orders referred neither to section 62 nor to section 72 of the Act or did not give any notice to parties as prescribed thereunder clearly indicates that the Government acted only under the said relevant rules. This argument so stated appears at the first blush to be unanswerable. But a scrutiny of the relevant provisions of the Act shows that the said rules are inconsistent with the provisions of the Act and they cannot possibly override the statutory power conferred on the Panchayat Samithi. Under section 18 (1) of the Act, subject to the provisions of the Act, the administration of the Block shall vest in the Panchayat Samithi and under sub-section (2) thereof the Panchayat Samithi shall exercise the powers and perform the functions specified in the Schedule. When we refer to the Schedule it will be

seen that the following entry is found under the heading "Health and Rural Sanitation", "Establishing and maintaining Primary Health Centre and Maternity Centres". It is manifest that under the Act the statutory power to establish and maintain Primary Health Centres is vested in the Panchayat Samithi. There is no provision vesting the said power in the Government. Under section 69 of the Act, the Government can only make Rules for carrying out the purposes of the Act; it cannot, under the guise of the said Rules, convert an authority with power to establish a Primary Health Centre into only a recommendatory body It cannot, by any rule, vest in itself a power which under the Act vests in another body. The Rules, therefore, in so far as they transfer the power of the Panchayat Samithi to the Government, being inconsistent with the provisions of the Act, must yield to section 18 of the Act.

Realizing this difficulty, the learned Solicitor-General, who appeared for the 4th respondent, made an attempt to reconcile the relevant rules with the provisions of section 18 of the Act. He argued that section 18 of the Act conferred a power on the Panchayat Samithi to establish and maintain Primary Health Centres, whereas the Rules provided for the location or shifting of the Centres. This argument does not appeal to us A Primary Health Centre cannot be established *in vacuum*; it must be established in some place. The Rules deprive the Panchayat Samithi of the power to select a place for establishing a Primary Health Centre and make it a recommendatory body with final powers in the Government. The Rules also confer a power on the District Medical Officer and the District Health Officer in the matter of location of the Centre and give the Government the final voice, if there is any conflict between those officers and the Panchayat Samithi. Even in regard to shifting of the Primary Health Centre, the Government's voice is final under the Rules. It is one thing to say that the exercise of the power by the Panchayat Samithi is regulated by the Rules, but another thing to deprive it of that power in the matter of location of the Primary Health Centre and confer the said power on the Government. We, therefore, hold that the Rules, in so far as they make the Panchayat Samithi a mere recommendatory body, are inconsistent with the Act. This may be the reason why in the High Court the Government did not think fit to sustain the order under the authority of the Rules.

The next question is whether the order, dated 18th April, 1963, can be sustained under section 72 of the Act. Section 72 of the Act reads:

Power of revision and review by Governement ·

(1) The Government may, either *suo motu* or on an application from any person interested. call for and examine the record of a Panchayat Samithi or a Zilla Parishador of their Standing Committees in respect of any proceeding tosatisfy themselves as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein, and, if, in any case, it appears to the Government that any such decision or order should be modified, annulled or reversed or remitted for reconsideration, they may pass orders accordingly

Provided that the Government shall not pass any order prejudicial to any party unless such party has had an opportunity of making a representation

(2) * * * * * *

(3) The Government may *suo motu* at any time or on an application received from any person interested within ninety days of the passing of an order under sub-section (1), review any such order if it was passed by them under any mistake, whether of fact or of law, or in ignorance of any material fact The provisions contained in the proviso to sub-section (1) and in sub-section (2) shall apply in respect of any proceeding under this sub-section as they apply to a proceeding under sub-section (1) "

Sub-section (1) of section 72 of the Act confers a wide power on the Government to revise any decision or order passed in any proceeding under the Act Sub-section (3) thereof confers a power on the Government to review the order made under sub-section (1) thereof if it was passed by the Government under any mistake, whether of fact or of law, or in ignorance of any material fact. To attract sub-section (3), the order sought to be reviewed should have been made

under sub-section (1) To appreciate the scope of section 72 (1) of the Act, it is necessary to compare the said sub-section with section 62 of the Act. Under section 62 (1), the Government may, by order in writing, cancel any resolution passed by a Panchayat Samithi, if in its opinion such resolution is not legally passed or is in excess or abuse of the powers conferred by or under the Act or for any other reasons mentioned therein. Under sub-section (2) of section 62, the Government shall, before taking action under sub-section (1) thereof give the Panchayat Samithi or the Zilla Parishad, as the case may be, an opportunity for explanation. Section 72 confers a general power on the Government; and on its terms, if there was no other section, it can cancel a resolution of a Panchayat Samithi. But section 62 of the Act confers a special power on the Government to cancel a resolution passed by a Panchayat Samithi in the circumstances mentioned therein. The principle *generalia specialibus non derogant* compels us to exclude from the operation of section 72 the case provided for under section 62. If so construed, it follows that if the order reviewed fell under the scope of section 62, it could not be reviewed under section 72, for section 72 (3) enables the Government only to review an order made under sub-section (1) of section 72 So, the learned Counsel for the State as well as for the 4th respondent made a serious effort to bring the order of the Government, dated 7th March, 1962, within the terms of section 72 (1) of the Act As the argument turns upon the terms of the said order, it may conveniently be read at this stage:

GOVERNMENT OF ANDHRA PRADESH.

Planning and Local Administration Department

MEMORANDUM NO 1354/Prog II/61-2, dated 7th March, 1962

Sub Community Development Programme—Chintalapudi Block—Shifting of Primary Health Centre from Dharmajigudem to Lingapalem—Orders issued.

Ref 1. Representation of Sri G Punneswararao and others, dated 31st June, 1961

2 Letter from Collector, West Godavari, No 01 5642/61, dated 22nd September, 1961

The Panchayat Samithi, Chintalapudi, at its meeting held on 25th August, 1960, unanimously resolved to locate the Primary Health Centre at Dharmajigudem Later, the Panchayat Samithi at its meeting held on 29th May, 1961 resolved to shift the Primary Health Centre permanently to Lingapalem village The President, Dharamajigudem Panchayat, and others have represented to Government against acceptance of the resolution passed by the Samithi at its meeting held on 29th May, 1961 This representation has been carefully examined by the Government in consultation with the Collector, West Godavari

Under rule 6 of the Rules for the establishment and maintenance of Primary Health Centres by Panchayat Samithis made under the provisions of the Panchayat Samithis and Zilla Parishads Act, 1959, the Primary Health Centre once established shall not ordinarily be shifted to another place within the Block unless the Samithi resolves by 2/3rd majority of the members present at the meeting as required under rule 7 of the said Rules In the present case the Primary Health Centre was already functioning at Dharmajigudem and the resolution of the Panchayat Samithi, dated 29th May, 1961, did not get the requisite support of the Samithi Members as required under rule 7. In the above circumstances, the Government consider that there are no valid reasons for shifting the Primary Health Centre from Dharmajigudem to Lingapalem. The Block Development Officer, Chintalapudi, is directed to take action accordingly

(Sd) B. PRATAP REDDI.

Deputy Secretary to Government.

It was said that the said order did not mention the section whereunder it was passed, that it did not cancel any resolution, that it did not in terms approve or disapprove any resolution, that it considered other orders issued and finally gave a direction to the Block Development Officer to take action in accordance with the terms of the order. In short, the argument of the learned Counsel was that the order was not for the cancellation of the resolution of the Panchayat Samithi but one made in terms of section 72 of the Act. We are not impressed by this

argument. The preamble to the order clearly mentions that the Panchayat Samithi, Chintalapudi, at its meeting held on 29th May, 1961, resolved to shift the Primary Health Centre permanently to Lingapalem village Then it states that the President of the Dharmajigudem Panchayat and others had represented to the Government against the acceptance of the said resolution. The order then records that the Government had carefully considered the said representations Then it gives the reason that the said resolution was bad inasmuch as that under rule 6 of the Rules the Primary Health Centre once established should not ordinarily be shifted to another place within the Block, unless the Panchayat Samithi resolves by two-thirds majority of the members of the Samithi present at the meeting as required by rule 7 of the Rules Then it points out that the Primary Health Centre was functioning at Dharmajigudem, and, therefore, the resolution, not having the support of the requisite majority, did not comply with rule 7 of the Rules. For the said reasons the order concludes that there were no valid reasons for shifting the Primary Health Centre from Dharmajigudem to Lingapalem. The Government then gives the consequential directions to the Block Development Officer to take action accordingly. An analysis of the order demonstrates beyond any reasonable doubt that it is nothing more than a cancellation of the resolution passed by the Panchayat Samithi on 29th May, 1961. The mere fact that the order does not use the expression "cancel" will not make it any the less an order cancelling the resolution We, therefore, hold that the order of the Government, dated 7th March, 1962, was one made under section 62 of the Act and, therefore, it could not be reviewed under section 72 thereof.

The learned Counsel for the State then contended that the order, dated 18th April, 1963, could itself be sustained under section 62 of the Act. Reliance is placed upon section 13 of the Madras General Clauses Act, 1891, whereunder if any power is conferred on the Government, that power may be exercised from time to time as occasion requires. But that section cannot apply to an order made in exercise of a quasi-judicial power. Section 62 of the Act confers a power on the Government to cancel or suspend the resolution of a Panchayat Samithi, in the circumstances mentioned therein, after giving an opportunity for explanation to the Panchayat Samithi If the Government in exercise of that power cancels or confirms a resolution of the Panchayat Samithi, *qua* that order it becomes *functus officio* Section 62, unlike section 72, of the Act, does not confer a power on the Government to review its orders Therefore, there are no merits in this contention.

Before we leave section 62 of the Act, it may be noticed that the order, dated 7th March, 1962, was passed by the Government without giving notice to the Panchayat Samithi. It was in violation of the mandatory provision of sub-section (2) of section 62 which says that the Government shall, before taking action under sub-section (1), give the Panchayat Samithi an opportunity for explanation. This opportunity was not given and, therefore, that order was not legal.

Now let us assume that the said order was made under sub-section (1) of section 72 of the Act. Two objections were raised against the validity of the order reviewing the previous order, namely, (i) there was no mistake of fact or law, and (ii) the said order, which was prejudicial to Dharmajigudem village, was made without giving an opportunity to the representatives of the said village of making a representation The order gives *in extenso* the history of the dispute between Dharmajigudem and Lingapalem in the matter of location of the Primary Health Centre It points out that all the earlier resolutions of the Panchayat Samithi were cancelled and the only outstanding resolution was that of 29th May, 1961, whereunder the said Centre was directed to be located permanently at Lingapalem. Then it proceeds to say that the order, dated 7th March, 1962, was passed on a mistaken impression that it was a case of shifting the Primary Health Centre from one place where it was permanently located to

another, while the correct position was that the place where the Primary Health Centre was to be located permanently had not till then been decided by the Government. In that view, in supersession of the order, issued by it on 7th March, 1962, it directed that the said Centre should be located permanently at Lingapalem as per the resolution of the Panchayat Samithi, dated 29th May, 1961. No doubt the statement in that order, namely, that the place where the Primary Health Centre was to be located permanently had not so far been decided by the Government, if taken out of context, may appear to be an incorrect statement, for the Government by its order, dated 6th July, 1960, approved the proposal of the Panchayat Samithi, Chintalapudi, to locate the Primary Health Centre permanently at Dharmajigudem But an analysis of the various orders passed by the Panchayat Samithi and the Government discloses, as we have already indicated, that the Primary Health Centre was never permanently located at Dharmajigudem, that before the Act it was located therein subject to certain conditions which were not fulfilled, that after the Act the Panchayat Samithi, though it passed a resolution on 28th May, 1960, approving the location of the said Centre permanently at Dharmajigudem and though it was approved by the Government by its order, dated 6th July, 1960, cancelled its earlier resolution in accordance with law on 29th May, 1961 and voted for locating the Centre at Lingapalem Therefore, the Government was right when it said in its order that it made a mistake of fact in passing its earlier order on 7th March, 1962, on a misapprehension that there was a permanent location of the Centre at Dharmajigudem.

But there is another flaw in the order of the Government, dated 18th April, 1963, *i e*, it made the order without giving an opportunity to the representatives of Dharmajigudem who were prejudicially affected by the said order. Learned Counsel for the State said that the appellant could not be considered to be a party prejudicially affected by that order. But, as we have stated earlier, the appellant was the President of the Committee which collected the amount, he was representing the village all through and he also deposited the prescribed amount with the Block Development Officer. The Government should have, therefore, given notice either to him or to the Committee, which was representing the village all through for the purpose of securing the location of the Primary Health Centre in their village The order made in derogation of the proviso to sub-section (1) of section 72 of the Act is also bad.

The result of the discussion may be stated thus : The Primary Health Centre was not permanently located at Dharmajigudem. The representatives of the said village did not comply with the necessary conditions for such location. The Panchayat Samithi finally cancelled its earlier resolutions which they were entitled to do and passed a resolution for locating the Primary Health Centre permanently at Lingapalem. Both the orders of the Government, namely, the order, dated 7th March, 1962, and that, dated 18th April, 1963, were not legally passed . the former, because it was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power under section 72 of the Act to review an order made under section 62 of the Act and also because it did not give notice to the representatives of Dharmajigudem village. In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government, dated 18th April, 1963 ? If the High Court had quashed the said order, it would have restored an illegal order—it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case.

In the result, the appeal is dismissed, but, in the circumstances of the case, without costs

K. G. S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—A. K. SARKAR, RAGHUBAR DAYAL AND V. RAMASWAMI, JJ.

Thiruvalanchuli Vaithilingam Pillai Charities .. *Appellants**

v.

Vijayavalli Achi and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 11—Res judicata—*Deed of partition between adoptive father and adopted son—Allotment of properties to adopted son and retention of some lands by adoptive father and mother for life—Vested interest to adopted son—Death of adoptive father—Suit against adoptive mother by adopted son claiming possession of entire properties—Defence of right to possession of entire properties by mother—Decision that half the properties to go to adopted son and half to be retained by mother for life—Stray sentence in the judgment that half-share of mother on her death would go to her representatives—If would constitute* res judicata—*Suit for possession by purchaser of the vested interest of the adopted son for the half-share held by the adoptive mother—Decision on a point not necessary for the purpose of the prior suit—Not to constitute* res judicata.

Under a deed of partition, the adoptive father allotted substantial properties to his adopted son and retained 100 acres of land for himself and the maintenance of his wife with a vested interest for the adopted son After the death of the adoptive father, the adopted son filed a suit against the adoptive mother claiming possession of the entire 100 acres Overruling the defence of the mother that she was entitled to be in possession of the entire 100 acres, the Court on a construction of the deed of partition held that she was entitled only to 50 acres for her life and the other 50 acres would go to the adopted son In the judgment of the trial Court occurred a stray sentence that the share of the mother after her death would go to her representatives In connection with the management and possession of certain trust properties, held by the adopted son, on a suit filed by the trustees an instalment decree had been passed against the adopted son and in execution of the decree that had created a charge on the vested interest of the adopted son in 50 acres held by the mother, the fifty acres were sold and purchased by the trust. After the death of the adopted son and mother, in the subsequent suit filed by the trust for the recovery of the 50 acres from the representatives of the adopted son, a plea of *res judicata* in defence was raised on the basis of the stray sentence of the Court in the prior suit that the 50 acres would go to her representatives

Held, the subsequent suit for recovery of possession was not barred by *res judicata.* A decision would operate as *res judicata* if it was necessary for the purpose of the case in which it had been given.

The question in the prior suit was whether the adopted son is entitled to get possession of the entire 100 acres on the death of the adoptive father and similarly whether the adoptive mother was entitled to retain possession of the entire 100 acres for her life On the construction of the deed of partition that the allotment of the properties had been validity made, the Court decided that the adopted son was entitled to 50 acres only and that the other 50 acres would be held by the adoptive mother for her life. It was not necessary for the Court for the decision of any of the disputes that arose in that suit to say to whom the lands that went to adoptive mother would go on her death as that question would depend upon the terms of the deed. Therefore the stray sentence in the prior judgment would not operate as *res judicata*

On the true interpretation of the deed of partition also the Court in the prior suit had proceeded on the basis that the adopted son was the person who was entitled to the properties after the death of the adoptive mother. The word "representative" has been used only to describe the adopted son.

Appeal against the Judgment and Decree of the High Court of Madras in A. S. No. 221 of 1956, reversing the Judgment of the Court of Subordinate Judge, Kumbakonam, in O. S. No. 33 of 1955

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* C.A. No. 453 of 1963. 6th October, 1965.

A V Viswanatha Sastri and *R Ganapathi Ayyar*, Advocates, for Appellants.

R N Agarvala, Advocate and *Messrs. Dadachanji & Co*, for Respondents.

The Judgment of the Court was delivered by

Sarkar, J—The only question argued in this appeal is whether the appellants's suit for possession of certain lands is barred by *res judicata* The trial Court held that it was not barred, but on appeal the High Court of Madras took a contrary view Though the question involved is only one, the case has a long history which has to be set out in some detail.

The appellants are the trustees of a trust created in 1891 by one Vaithilingam Pillai who appears to have possessed substantial properties On 10th September, 1891, the day after the trust had been created, Vaithilinga who was — childless, adopted one Kalyanasundaram as his son An agreement relating to the adoption, appears then to have been entered into by, Vaithilinga and Chidambaram Pillai, the natural father of Kalyanasundaram, then a minor, on the latter's behalf. Thereafter on 12th September, 1891, a deed of partition was executed by Vaithilinga and Chidambaram, as the guardian of Kalyanasundaram appointed under an instrument executed in the meantime by the Vaithilinga as the adoptive father of Kalyanasundaram Under this deed, the larger part of the properties left with Vaithilinga after the creation of the trust which were considerable went to Kalyanasundaram and about 100 acres were retained by Vaithilinga for the maintenance of himself and his junior wife Kamakshi Vaithilinga had another wife from whom he had been separated for a long time and with her we are not concerned It will be be necessary to return to that part of the deed under which, the 100 acres were retained by Vaithilinga later On 15th June, 1904, Vaithilinga died. Both Kamakshi and Kalyanasundaram survived him Soon thereafter *viz*, on 21st September, 1904, Kalyanasundaram who had then attained majority filed a suit being O.S No. 54 of 1904 against Kamakshi and another person with whom we are not concerned, claiming possession of the 100 acres of land which had been left with Vaithilinga under the partition deed as earlier stated, after setting apart about 20 acres for Kamakshi's maintenance Kamakshi's defence to the suit appears to have been that under the deed she was entitled to be in possession of the entire 100 acres for her life after the death of her husband. The Subordinate Judge of Kumbakonam in whose Court the suit had been filed held that Kamakshi was entitled to retain for her life 50 acres out of the 100 acres of land in dispute and that the other 50 acres should go to Kalyanasundaram on Vaithilinga's death. The learned Subordinate Judge directed a partition of the land equally between Kalyanasundaram and Kamakshi. Kamakshi filed an appeal against this judgment and Kalyanasundaram a cross-objection Both these were however dismissed. The decree of the learned Subordinate Judge having thus been confirmed, the lands were partitioned and possession of a half share thereof was delivered to Kalyanasundaram. The remaining 50 acres were left in the possession of Kamakshi. The dispute in the present case concerns the lands that came to Kamakshi's share under the decree of the learned Subordinate Judge. The judgment in Suit No. 54 of 1904 was delivered on 7th July, 1905, and it is this judgment which is said to operate as *res judicata* barring the present suit.

We pass on now to the facts concerning the appellants' claim. It appears that certain proceedings took place, the exact nature of which does not appear from the records, for framing a scheme in respect of the trust created by Vaithilinga Presumably prior to these proceedings first Vaithilinga and after him Kalyanasundaram had been acting as trustees of the trust and had been in possession of the trust properties It will have been noticed that the trust properties were quite separate from the 100 acres with which Suit No 54 of 1904 was concerned On 28th August, 1923, by a decree passed in the proceedings earlier referred to, a scheme for the management of the trust was framed. The appellants are the present trustees under the scheme. On 2nd April, 1928, a

decree for Rs. 30,000 was passed in the same proceedings in favour of the then trustees and against Kalyanasundaram This perhaps was in respect of a claim by the trustees aginst Kalyanasundaram for mesne profits The decree last mentioned created a charge on some of Kalyanasundaram's properties for the due repayment of the decreed amount It also provided that the amount would be payable in certain specified instalments. The decretal sum not having been paid, the trustees put up certain properties of Kalyanasundaram to Court sale in execution of the decree The sale actually took place on 2nd April, 1931 and it was confirmed on 7th April, 1933. Lot No 3 of the properties sold was described as the lands which were being enjoyed by Kamakshi for her life and in which Kalyanasundaram had a vested interest These were the 50 acres of which Kamakshi had been hold entitled to be in possession for her life under the decree in Suit No. 54 of 1904 The sale certificate stated that the sale was subject to the rights of Kamakshi to enjoy the properties in lot No 3 for her life Symbolical delivery of possession of the 50 acres of land comprised in lot No. 3 of the sale certificate as mentioned earlier was given to the trustees on 12th February, 1935. The lands however continued in the possession of Kamakshi as indisputably she was entitled to be in possession for her life What had been sold was Kalyanasundaram's vested interest in the 50 acres Kalyanasundaram died sometime in 1950 and Kamakshi on 30th November, 1954 On 24th June, 1955, the then trustees filed the present suit against Kalyanasundaram's widow and daughter and certain other persons for possession of the 50 acres of land which had been in Kamakshi's possession till her death and also for mesne profits, basing their claim on the purchase by them of Kalyanasundaram's vested interest in them which had fallen into possession on Kamakshi's death The only defence to this claim made in the High Court and in this Court is that the Subordinate Judge in his judgment in Suit No 54 of 1904 had held that on Kamakshi's death the 50 acres in her possession would go to her representatatives and that this judgment operated as a bar to the present suit. Besides. this defence other defences were raised in the trial Court but they were not pressed in the High Court or in this Court.

The partition deed so far as material is in these terms: "The lands 15 velis, 3 mahs, 60 cents shall remain in the enjoyment of Vaithilingam Pillai for the livelihood of the said Vaithilingam Pillai as well as his junior wife Kamakshi After the lifetime of Vaithilingam Pillai and Kamakshi these lands shall fall to the enjoyment of Kalyanasundaram Pillai." We are not concerned with the rest of the deed and all references in this judgment to the deed will be understood as a reference to this part of it only The 15 Velis, 3 mahs and 60 cents of land, which in English measure would come roughly to 100 acres were the lands which were the subject-matter of Suit No 54 of 1904. It is not disputed that on proper interpretation, under the deed, Kalyanasundaram acquired a vested interest in these 100 acres. The only question is whether notwithstanding the correct interpretation of the deed, the judgment in Suit No. 54 of 1904 operates as *res judicata* To put it more precisely: Did that judgment hold that Kalyanasundaram did not have a vested interest in the lands and if it did, was that finding necessary for the decision of the suit ?

Now, Kalyanasundaram had based his claim in Suit No. 54 of 1904 to the entirety of the 100 acres substantially on the ground that his guardian had no power to enter into a deed of partition on 12th September, 1891, as by the deed of adoption earlier executed by Vaithilinga, he had become the sole owner of all of Vaithilinga's properties. It is unnecessary to discuss the judgment of the learned Subordinate Judge as a whole in detail and it would suffice for our purpose to state that he rejected Kalyanasundaram's claim in substance holding that the adoption agreement, the deed of appointment of Chidambaram as guardian of Kalyanasundaram, and the deed of partition had to be considered all together. And Kalyanasundaram was not entitled to ignore the deed of partition and recover the properties entirely on the basis of the adoption agreement. The learned Subordinate Judge observed "even granting

for arguments sake that Exhibit D (the deed of partition) was a deed of maintenance in favour of Vaithilinga and the first defendant (Kamakshi) as contended by the Pleader for the plaintiff (Kalyanasundaram), I do not consider that the arrangement evidenced by it is improper or beyond the powers of the plaintiff's guardian By Exhibit D about 55 velis of land were absolutely given to the plaintiff and the life interest in about 15 velis of land was reserved in favour of Vaithilinga and his wife, *i e* about 4/5th of the family properties was given to the plaintiff and the life interest in the remaining 5th share was taken by those who had gratuitously made him their adopted son and given to him the bulk of the property. They reserved to themselves, no right of alienation or disposition over the abovementioned 5th share and declared that it should descend to plaintiff after their deaths. Therefore, I do not consider the plaintiff can on any ground succeed in setting aside the arrangement evidenced by Exhibit D." The portions in brackets in the above quotation have been added by us.

Having thus rejected Kalyanasundaram's claim to the entirety of the 100 acres, the learned Subordinate Judge proceeded to consider Kamakshi's claim to all the 100 acres on Vaithilinga's death for her life He thought that Kamakshi's claim could be upheld only if it could be said that under the deed she and Vaithilinga had been made joint tenants of the 100 acres After referring to certain authorities on the point, he observed "Where the intention was declared in equally strong words, it was decided that the estate taken was not joint in the sense in which it is enjoyed by undivided co-parceners and it was only an estate held by tenants-in-common. Therefore, when one of the tenants died, his share in the estate naturally descended to his legal representative, that is, to the plaintiff, unless there is something express in the terms of Exhibit D to show that the whole estate should be enjoyed by the first defendant during her lifetime. Such express declaration is wanting in Exhibit D The recital that plaintiff should possess the estate after Vaithilinga and first defendant, can be construed when the estate is only that of tenants-in-common (as meaning) that the share of Vaithilinga should go to his legal representative after his death and that the share of first defendant should go after her death to her representative. The words "as meaning" (have been added by us) as they seem to have been omitted in the judgment. The parties agree that without these words, the meaning is not clear. In the view that he had thus taken, the learned Subordinate Judge rejected Kamakshi's claim to succeed on the death of Vaithilinga as the joint tenant. To the entirety of 100 acres of land and held that Kalyanasundaram was entitled to half of it. Pursuant to this decision, the partition to which we have earlier referred, was made. We would here remind that an appeal and a cross-objection against this judgment was rejected.

The learned Counsel for the respondents relies on the words "the share of the 1st defendant should go after her death to her representative" in the judgment of the learned Subordinate Judge which we have earlier quoted and contends that they decide that the Subordinate Judge on an interpretation of the deed of partition held that on Kamakshi's death, her share would go to her representative. It was said, that it had, therefore, been held by him that Kalyanasundaram had no vested interest in the 50 acres of which Kamakshi was held to be entitled to continue in possession We should suppose that if such was the interpretation of the deed by the learned Subordinate Judge, his judgment might operate as *res judicata* barring the claim of the appellants in the present suit for the claim through Kalyanasundaram who was a party to the earlier suit. The question appears to us to be whether this sentence in this judgment amounts to a decision operating as *res judicata* It is unnecessary to refer to the decision on the point of *res judicata*, it is enough to say that a decision can operate as *res judicata* if it was necessary for the purpose of the case in which it had been given. There is no dispute between the parties on this point

Now, it seems to us perfectly clear that no question arose in Suit No 54 of 1904 as to the person who would succeed after her death to any property that

might come to Kamakshi under a decree made in it It was not necessary for the learned Subordinate Judge for the decision of any of the disputes that arose in that suit to say to whom the lands that went to Kamakshi would go on her death It would, therefore, appear that the sentence in the judgment in Suit No. 54 of 1904 on which the learned Counsel for the respondents relied could not operate as *res judicata* barring the present suit

There are however other reasons supporting that view. In an earlier part of his judgment which we have already quoted, the learned Subordinate Judge held that by the deed, it was declared that the entire 100 acres "should descend to the plaintiff after their deaths", *i e* those lands will go to Kalyanasundaram after the death of Vaithilinga and Kamakshi This was really his interpretation of the deed so far as the devolution of the lands was concerned, it would be legitimate to suppose that the learned Subordinate Judge did not intend to contradict himself interpreting the same words in the deed in a different way by using the sentence that the share of the 1st defendant should go after her death to her representative It has to be remembered that at the date of the judgment Kalyanasundaram was the legal representative of both Vaithilinga and Kamakshi It seems to us, therefore, to be a natural interpretation of the sentence in the judgment on which the respondents rely to hold that the word " representative" had been used really as indicating Kalyanasundaram We should also point out that in the earlier part of the judgment as also in the part on which, the respondents relied it was held that Vaithilinga and Kamakshi had by the deed been given only a life interest in the lands It would not be a natural interpretation of the learned Judge's judgment, to hold that having decided that under the deed Vaithilinga and Kamakshi held lands only for their lives he proceeded to decide that at their deaths, the lands would go to their respective represntatives. The question was of the rights under the deed and if under the deed Vaithilinga and Kamakshi had only life interest in the lands, their ultimate destination had to be decided by the terms of the deed if it made any provision in that behalf which it did Admittedly under the deed the lands were to go to Kalyanasundaram after the death of Vaithilinga and Kamakshi. The learned Subordinate Judge was not deciding any question of intestate succession to the lands on the death of these two.

It also seems to us that in the portion of the judgment on which the respondents rely the learned Subordinate Judge only dealt with the question whether Kalyanasundaram who had been held not to be entitled to the entirety of the 100 acres was entitled to any portion of the lands The real point in that connection, according to the learned Subordinate Judge was whether the deed has made Vaithilinga and Kamakshi joint tenants in respect of the 100 acres or tenants-in-common because it was only in the latter event that Kalyanasundaram might claim a half share in the lands on Vaithilinga's death Having held that the words of grant in the deed read by themselves created a tenancy-in-common in the lands in favour of Vaithilinga and Kamakshi, he proceeded to consider whether the words provide for the lands going to Kalyanasundaram on the deaths of Vaithilinga and Kamakshi it should lead to a different interpretation of the words of grant and held that they were not clear enough to do so. Having thus decided that Vaithilinga had a half share in the lands as a tenant-in-common with Kamakshi, he proceeded to consider whether the provision in the deed that Kalyanasundaram would get the lands after the life-time of Vaithilinga and Kamakshi could be interpreted to mean that though the lands were held as tenants in common by Vaithilinga and Kamakshi, Kalyanasundaram was not entitled to any part of the land till after the death of both of them and that till then, Kamakshi was entitled to them as she claimed. He answered the question in the negative and it was in that connection only that he said the proper interpretation of these words was that the share of Vaithilinga in the lands was given to his representative after his death and the share of Kamakshi to her representative after her death He was only deciding that the words meant that on the death of each his or her share would devolve as provided in the deed and not pass to the persons who survived, On this basis he held that Kalyanasundaram was

entitled on Vaithilinga's death to the 50 acres which the latter held for his life Kalyanasundaram did not claim as the legal representative of Vaithilinga but as the person named in the deed. He of course was Vaithilinga's legal representative and obviously that is why the learned Subordinate Judge used these words to describe him. We are unable to hold that he was interpreting the deed as meaning that the share each of Vaithilinga and Kamakshi in the lands would go on their respective deaths to their legal representatives whoever they might be at the time That was not a question that arose or he was asked to decide. We are therefore of the view that there is nothing in the judgment in Suit No. 54 of 1904 to operate as barring this suit by way of *res judicata* It is of some interest to point out that the sale in execution on which the trustees-plaintiffs now represented by the appellants before us based their claim was expressly of Kalyanasundaram's vested interest under the deed in the lands which were then in Kamakshi's possession under the decree in Suit No. 54 of 1904 The trustees in that application for execution had alleged that Kalyanasundaram had such vested interest The order directing the sale held that he had such a vested interest The certificate of sale mentioned that Kalyanasundaram had a vested right in these lands That would appear to be a decision binding on the respondents as Kalyanasundaram's heir.

The learned Counsel for the respondents stated that if we found ourselves in agreement with the appellant's contention, we should refer the case back to the High Court for the decision of various other points that arose in it This contention seems to us to be wholly unfounded It is clear from the judgment of the High Court under appeal that before that Court the respondents confined their argument only to the question of *res judicata.* Besides this aspect of the matter the learned Counsel for the respondents was also unable to refer us to any point of any substance which could have been argued with plausibility in the High Court in support of the respondents' case and was not argued. We find no reason to refer the case back to the High Court for decision of any outstanding point. We are clear that no other point remains to be decided.

In the result we allow the appeal, set aside the judgment of the High Court and restore that of the learned trial Judge. The appellant will get the costs of the proceedings in the High Court and in this Court

V S. *Appeal allowed.*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction.)

PRESENT .—MR JUSTICE P. B GAJENDRAGADKAR, *Chief Justice,* MR JUSTICE K. N WANCHOO, MR. JUSTICE M HIDAYATULLAH AND MR JUSTICE V. RAMASWAMI

Yenumula Malludora . *Appellant**

v.

Peruri Seetharatnam and others .. *Respondents.*

Provincial Insolvency Act (V of 1920), *sections* 6, 7 *and* 25—*Debtor's property sold in execution of money decree—Sale set aside under Order* 21, *rule* 89, *Civil Procedure Code—Act of insolvency if wiped out—If sufficient cause for refusal to adjudicate under section* 25

The jurisdiction of the Court commences when an act of insolvency takes place and that act gives a right to his creditors to apply to the Court for his adjudication under section 7 within 3 months of that act of insolvency Sale of a person's property in execution of a decree for payment of money is an act of insolvency under section 6 Once such an act is committed it cannot be explained or purged by subsequent events The insolvent cannot claim to wipe off by paying some of his creditors The act of insolvency thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree

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*C A. No. 474 of 1964. 14th October, 1965.

Section 25 expressly mentions three circumstances in which the creditor's petition may be dismissed, in addition the Court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor This last clause of the section need not necessarily be read *ejusdem generis* with the previous ones. but even so there can be no sufficient cause if, after an act of insolvency is established the debtor is unable to pay his debts The discretion to dismiss the petition can only be exercised under very different circumstances than that alleged (setting aside the sale which was the act of insolvency)

In the instant case there is no proof of malicious or inequitable dealing on the part of the petitioning creditors (respondent herein) They have proved the necessary facts both the act of insolvency and the inability of the appellant to pay his debts In fact the appellant has admitted his inability to pay his debts

Appeal by Special Leave from the Judgment and Order dated the 14th March, 1963 of the Andhra Pradesh High Court in C R.P No. 1725 of 1959.

M C Setalvad, Senior Advocate (*T V. R. Tatachari*, Advocate, with him), for Appellant

Kirpa Narain, Senior Advocate, (*T. Satyanarayana*, Advocate, with him), for Respondents No. 1 and 9.

The Judgment of the Court was delivered by

Hidayatullah, J.—On the application of two creditors the appellant Yenumula Mallu Dora has been adjudged insolvent by the Subordinate Judge, Kakinada and a receiving order has been passed against him The respondents before us are one of the petitioning creditors and the legal representatives of the other petitioning creditor who died during these proceedings. The first petitioning creditor held a decree for money which he had obtained in O S No 67 of 1949. He also held another money decree in O S No 473 of 1948 The second petitioning creditor held a decree which she had obtained in O S No. 17 of 1955 The application was based upon three acts of insolvency which the appellant was stated to have committed and on the general facts that he was indebted to the tune of Rs 2,00,000 and was unable to pay his debts. The three acts of insolvency alleged against him were (*a*) evasion of arrest in execution of the money decree in O S No 67 of 1949, (*b*) sale of some of his properties on 26th September, 1956, in execution arising from O S. No. 73 of 1952; and (*c*) sale of some of his properties on 19th September, 1956, in execution of money decree in O S No 9 of 1950 It was also alleged that he was fraudulently transferring properties in the name of his wife and brother-in-law and had suffered a collusive charge decree for maintenance in favour of his wife, to delay and defeat his creditors.

The Subordinate Judge, Kakinada, did not accept the first two acts of insolvency The evidence regarding evasion of arrest was not found convincing and the second act of insolvency was rejected because the sale of the property was in execution of a mortgage decree In respect of the third act of insolvency the Subordinate Judge held that it satisfied section 6 (*e*) of the Provincial Insolvency Act and an adjudication and a receiving order were justified in the case An appeal was taken to the District Court at Rajahmundry (C A. No 41 of 1958) which was dismissed on October 15, 1959. A revision application filed under section 75 of the Provincial insolvency Act was dismissed by the High Court of Andhra Pradesh on 14th March, 1963. The appellant, however, obtained Special Leave of this Court and has filed the present appeal against the order of the High Court

The contention of the appellant was, and still is, that the third act of insolvency was not established as he had deposited, within one month of the sale, the entire decretal amount together with poundage and commission and the sale was set aside on his petition under Order 21, rule 89 of the Code of Civil Procedure. He contended therefore, that as none of the acts of insolvency remained, the petition ought to have been dismissed as incompetent or he was entitled to have the petition dismissed, in any event, under section 25 of the Provincial Insolvency Act which allows a creditor's petition to be dismissed on sufficient cause. He sub-

mitted that as the sale was set aside before the order of adjudication was made there existed sufficient cause for the dismissal of the creditor's petition. The Subordinate Judge relying upon *Venkatakrishnayya* v. *Malakondayya*[1] and on decisions of the Lahore and the Calcutta High Courts rejected the submission and made the order against the appellant The District Judge, Rajahmundry, agreed with the conclusion of the Subordinate Judge, and the High Court rejected the petition for revision In this appeal the same points are urged again for our acceptance In our judgment the view of the law taken in this case by the Subordinate Judge and approved by the District Court is right and does not warrant any interference.

The object of the law of insolvency is to seize the property of an insolvent before he can squander it and to distribute it amongst his creditors It is, however, not every debtor, who has borrowed beyond his assets or even one whose property is attached in execution of his debts, who can be subjected to such control. The jurisdiction of the Court commences when certain acts take place which are known as acts of insolvency and which give a right to his creditors to apply to the Court for his adjudication as an insolvent. The Provincial Insolvency Act lays down in section 6 what acts are to be regarded as acts of insolvency It is a long list Some are voluntary acts of the insolvent and some others are involuntary. The involuntary acts are of a kind by which a creditor is able to compel a debtor to disclose his insolvent condition even if the insolvent is careful enough not to commit a voluntary act of insolvency. One such act is that the insolvent has been imprisoned in execution of a decree of any Court for payment of money, and another is that any of his property has been sold in execution of a decree of any Court for payment of money In this case the property of the appellant was sold on 19th September, 1956, in execution of a money decree against him and therefore there is no question that he was guilty of an act of insolvency described in section 6 (*e*) of the Provincial Insolvency Act.

Under section 7, a creditor is entitled to present a petition in the insolvency Court against a debtor if he has committed an act of insolvency provided (as laid down in section 9 (1) (*c*)) the petition is made within three months of the act of insolvency on which the petition is grounded In this case both these conditions are fulfilled There is thus no doubt that the petitioning creditors' application under section 7 complied with section 6 (*e*) and section 9 (1) (*c*) of the Provincial Insolvency Act The petitioning creditors alleged that the appellant was indebted to the extent of Rs 2,00,000 and this was not denied by the appellant In the trial of one of the execution petitions filed against him by a decree-holder the appellant admitted that he had "no means to pay the decree debt" because "all his properties" were "under attachment and were being brought to sale". He also stated that he was not "in a position to discharge the debts". It is, therefore clear that the appellant who was in more than embarrassed pecuniary circumstances was unable to pay his debts It was also clear from the evidence, which the District Court and the Subordinate Judge have concurrently accepted, that he had made some transfers to screen his properties from his creditors and had suffered a decree for maintenance in a suit by his wife In view of these facts, which the appellant cannot now deny, he is driven to support his case by argument on law. The argument, as we have seen, is two-fold. We are not inclined to accept either leg of the argument.

An act of insolvency once committed explained or purged by subsequent events The insolvent cannot claim to wipe it off by paying some of his creditors This is because the same insolvency is available to all his creditors. By satisfying one of the creditors the act of insolvency is not erased unless all creditors are satisfied because tillall creditors are paid the debtor must prove his ability to meet his liabilities. In this case the petitioning creditors had their own decrees. It was in the decree of another creditor that the payment was

1. (1942) 1 M L J 38· A.I.R. 1942 Mad. 306

made but only after the act of insolvency was committed. Besides the petitioning creditors there were several other creditors to whom the appellant owed large sum of money and his total debts aggregated to Rs. 2 lakhs It is plain that any of the remaining creditors including the petitioning creditors, could rely upon the act of insolvency even though one or more creditors might have been paid in full The act of insolvency which the appellant had committed thus remained and was not purged by payment of decretal amount after the sale in execution of the money decree

The next question is whether the Subordinate Judge should have exercised his discretion under section 25 to dismiss the petition of the creditors treating the deposit of the money as sufficient cause. Section 25 of the Provincial Insolvency Act is in wide terms but it is impossible to give effect to those wide terms so as to confer a jurisdiction to ignore an act of insolvency at least in cases where the debtor continues to be heavily indebted and there is no proof that he is able to pay his debts The section reads as follows.—

"25 *Dismissal of petition* —(1) In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition

(2) * * * *

* * * * "

The section expressly mentions three circumstances in which the petition made by a creditor must be dismissed, namely, (i) the absence of the right of the creditor to make the application; (ii) failure to serve the debtor with the notice of the admission of the petition, and (iii) the ability of the debtor to pay his debts In addition the Court has been given a discretion to dismiss the petition if it is satisfied that there is other sufficient cause for not making the order against the debtor. The last clause of the section need not necessarily be read *ejusdem generis* with the previous ones but even so, there can be no sufficient cause if, after an act of insolvency is established the debtor is unable to pay his debts. The discretion to dismiss the petition can only be exercised under very different circumstances. What those cases would be, it is neither easy nor necessary to specify, but examples of sufficient cause are to be found when the petition is malicious and has been made for some collateral or inequitable purpose such as putting pressure upon the debtor or for extorting money from him or where the petitioning creditor having refused tender of money, fraudulently and maliciously files the application. An order is sometimes not made when by the receiving order the only asset of the debtor would be destroyed such as a life interest which would cease on his bankruptcy. Cases have also occurred where a receiving order was not made because there were no assets and it would have been a waste of time and money to make a receiving order against the debtor. These examples merely illustrate the grounds on which orders are generally made in the exercise of the discretion conferred by the last clause of section 25 This case is clearly one which cannot be treated under that clause. There are huge debts and no means to pay even though there are properties which, if realised, may satisfy at least in part the creditors of the appellant The appellant was clearly guilty of an act of insolvency and an act of insolvency cannot be purged by anything he may have done subsequently. There is no proof of malicious or inequitable dealing on the part of the petitioning creditors. They have proved the necessary facts and have established both the act of insolvency and the inability of the appellant to pay his debts The appellant has not been able to prove that he is able to pay In fact, he has admitted that he is unable to pay his debts.

The High Courts have taken a similar and uniform view of such cases These rulings are quite numerous but the following may be seen. *Pratapmall*

Rameshwar v. *Chunnilal Jahuri*[1], *Lal Chand Chaughuri* v. *Bogha Ram and others*[2] and *Venkatakrishnayya* v. *Malakondayya*[3] We do not consider it necessary to examine the facts in those cases because they apply correctly the principles, which we have set out above to the facts in the cases then present. It is, therefore, quite clear that the adjudication of the appellant and the receiving order against him were properly made. In the result the appeal fails and is dismissed There will be no order as to costs.

K G.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

The Management of the Syndicate Bank, Ltd. .. *Appellant**

v.

The Workmen .. *Respondents.*

Industrial Dispute—Employer, a bank—Order of transfer of an employee—Act in the sole discretion of the Bank—No interference by Industrial Tribunal unless act done mala fide—*Finding of* mala fide—*To be based on sufficient and proper evidence*

The Banks are entitled to decide on a consideration of the necessities of banking business whether the transfer of an employee should be made to a particular branch. The management of the Bank is in the best position to judge how to distribute its employees between the different branches. The Industrial Tribunals should be very careful before they interfere with the orders made by the Banks in the discharge of their managerial functions.

But if an order of transfer is *mala fide* or for some ulterior purpose, like punishing an employee for his trade union activities, the Industrial Tribunals should interfere and set aside such an order of transfer, because the *mala fide* exercise of power is not considered to be the legal exercise of the power given by law.

But the finding of *mala fide* should be reached only if there is sufficient and proper evidence in support of such a finding Such a finding should not be reached capriciously or on flimsy grounds.

The finding of *mala fide* reached by the Tribunal cannot be sustained on the evidence in the present case.

Appeal by Special Leave from the Award dated the 18th January, 1964 of the Industrial Tribunal, Andhra Pradesh, in Industrial Dispute No. 33 of 1963.

M C. Setalvad, Senior Advocate (*R. V. Pillai*, Advocate with him), for Appellant.

M. K. Ramamurthi, R K Garg, S. C Agarwal and *D. P. Singh*, Advocates of *M/s. M. K Ramamurthi & Co*, for Respondents.

The Judgment of the Court was delivered by

Ramaswami, J.—This appeal is brought, by Special Leave, from the award of the Industrial Tribunal, Andhra Pradesh dated 18th January, 1964 in Industrial Dispute No 33 of 1963 and published in *Gazette of India* No. 6, dated 8th February, 1964

K. Veeranna was employed as a Clerk by the Syndicate Bank Ltd. (hereinafter called the 'Bank') in the Vijayawada branch An order was made on 2nd May, 1963 for the transfer of Veeranna from Vijayawada to a new branch

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1 A I R. 1933 Cal 417
2. A I.R. 1938 Lah 819
3. (1942) 1 M L.J. 38.

*C A. No. 248 of 1965. 4th November, 1965.

of the Bank which was to open at Banganpalli. Veeranna refused to join duty at Banganpalli and applied for leave on medical grounds Veeranna continued to remain on such leave till 12th December, 1963 when the Bank had to post one Chandrasekhar from the Nandyal branch to the Banganpalli branch in place of Veeranna In June, 1963 Veeranna was elected as Joint Treasurer of the Andhra Pradesh unit of the respondent's Union. Veeranna claimed that he was entitled to exemption from transfer under the Sastry Award and the dispute was referred for adjudication by the Government of India under section 10 (1) (*d*) of the Industrial Disputes Act to the Industrial Tribunal, Hyderabad. The issue was·

"Whether the transfer of K. Veeranna a workman of Canara Industial and Syndicate Bank Ltd, from Vijayawada to Banganpalli is justified and if not, to what relief is the workman entitled?"

After hearing the evidence adduced by the parties the Industrial Tribunal decided the issue in favour of the respondent's Union and held that the transfer of Veeranna was prompted by *mala fide* considerations and, therefore, he was entitled to be retained at Vijayawada

On behalf of the appellant, Mr. Setalvad put forward the argument that the finding of the Tribunal is perverse and is not supported by any evidence and that the award of the Tribunal may, therefore, be set aside as being defective in law In our opinion, the argument of Mr. Setalvad is well-founded and must be accepted as correct. The Tribunal has stated, in the first place, that the order of transfer was *mala fide* because the Bank had framed charges against Veeranna regarding a scheme of pigmy collections and the transfer was an attempt to victimise Veeranna for the part he had taken in the dispute between the Bank and the employees in this connection It appears that the Bank had framed charges against Veeranna in September, 1962 and the dispute about the pigmy collections arose because the Reserve Bank of India, acting under the provisions of the Banking Companies Act, objected to the payment of allowance to the employees of the Bank by virtue of the Deposit Scheme and therefore the Bank had to suspend the collection of deposits by members of its staff. It appears that Veeranna refused to surrender the Collection Cards etc though he was asked to do so twice by the Bank by notice in writing. After the framing of the charges on 20th November, 1962 for indiscipline an enquiry was held by the Bank and the charges were found proved against Veeranna But the significant fact is that Veeranna was subsequently pardoned by the Bank and no action was taken against him. Veeranna himself admitted in his deposition as follows:

"There was a domestic enquiry and after the enquiry the recommendation was that I shall be dismissed but the Managing Director pardoned me"

It is, therefore, clear that the dispute concerning pigmy deposits was settled between the Bank and the workmen on 20th January, 1963 on which date the parties to the settlement agreed to refer the dispute to the Industrial Tribunal. It is far-fetched to say that there is any connection between that dispute and the order of transfer made on 2nd May, 1963. The second reason given by the Tribunal is that Veeranna was Joint Treasurer of the Provincial unit of the All India Union and the transfer was made by the Bank as the Bank wanted to victimise Veeranna and to deprive the Union of his services as an office-bearer of the Union. But it is the admitted position that Veeranna was elected to the office of Joint Treasurership in June, 1963 *i e.*, about a month after his transfer order was issued and the Bank could not have known at the time of making the order of transfer that Veeranna would be elected as the Joint Treasurer of the Union It is, therefore, not possible to attribute bad faith to the Bank in making the order of transfer of Veeranna. The third reason given by the Tribunal is that there was an alternative person *viz*, Balaramiah Chetty who could have been transferred to Banganpalli in place of Veeranna

but the alternative arrangement was not deliberately made and Veeranna was forced to go to Banganpalli. It appears from the evidence that Balaramiah Chetty made an application on 24th April, 1962, for transfer to Raichuti or Banganpalli but at that time he was working at Madras which is regarded as Area I for the purpose of remuneration under the Desai Award Therefore, in the event of transfer of Balaramiah Chetty the Bank would have had to continue paying him the Area I remuneration and would also have had to pay his substitute in Madras at the same rate The post at Banganpalli was in a lower remuneration area and the transfer of someone from a similar remuneration area, such as Vijayawada, would have involved the Bank in no extra cost The Bank had, therefore, offered to transfer Balaramiah Chetty on condition that he should be prepared to receive the remuneration of the area where he desired to be posted As this condition was not acceptable to Balaramiah Chetty the transfer order was issued to Veeranna on 2nd May, 1963.

Lastly, the Tribunal has stated that Veeranna was under an apprehension that on account of the transfer he would be deprived of a special allowance of Rs 20 which was payable to him under the Desai Award There is no substance in this point, because the Bank has said that Veeranna was posted as a Clerk at Banganpalli in the same scale of pay and was entitled to the same allowance as he was drawing at Vijayawada It is also stated by the Bank's witness before the Tribunal that Veeranna would be paid Rs. 20 allowance even at Banganpalli. Having analysed the evidence in this case, we are of opinion that the finding of the Tribunal that the transfer of Veeranna is *mala fide* is not supported by any evidence and it is, therefore, perverse and defective in law. There is no doubt that the Banks are entitled to decide on a consideration of the necessities of banking business whether the transfer of an employee should be made to a particular branch. There is also no doubt that the management of the Bank is in the best position to judge how to distribute its employees between the different branches We are, therefore, of opinion that Industrial Tribunals should be very careful before they interfere with the orders made by the Banks in discharge of their managerial functions. It is true that if an order of transfer is made *mala fide* or for some ulterior purpose, like punishing an employee for his trade union activities, the Industrial Tribunals should interfere and set aside such an order of transfer, because the *mala fide* exercise of power is not considered to be the legal exercise of the power given by law. But the finding of *mala fide* should be reached by Industrial Tribunals only if there is sufficient and proper evidence in support of the finding Such a finding should not be reached capriciously or on flimsy grounds as the Industrial Tribunal has done in the present case. This view is borne out by the decision of this Court in *Bareilly Electricity Supply Co, Ltd* v. *Sirajuddin and others.*[1]

For these reasons we allow this appeal and set aside the order of the Industrial Tribunal dated 18th January, 1964 and hold that transfer of Veeranna from Vijayawada to Banganpalli was justified and the issue referred to the Industrial Tribunal should be answered in favour of the Bank. There will be no order as to costs

V. S. *Appeal allowed.*

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1 (1960) 1 L.L.J. 556

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—A. K. SARKAR, K. N. WANCHOO AND J. R. MUDHOLKAR, JJ.

Addanki Narayanappa and another .. *Appellants**

v.

Bhaskara Krishnappa (dead) and thereafter his heirs and others .. *Respondents.*

Registration Act (XV of 1908), section 17 (1)— Applicability— Karar executed by a partner—His share in the 'machine etc and business' given up and 'made over' to the other partner—Recital, certain immovable property 'had been given' to executant—Partnership Act (IX of 1932), section 48.

The document in question, a *karar* executed by *A* (a partner) recorded the fact that the partnership had come to an end, that *A* had given up his share in the 'machine etc. and the business' and the same had been 'made over" to the other partner *B* alone completely by way of adjustment and also recited that *A* had been given certain immovable property (trading asset) of the business by *B*. It was not registered On the question of the validity of the document,

Held, from a perusal of the provisions of section 48 of the Partnership Act (IX of 1932) it is clear that whatever be the *character* of the property brought in by the partners or acquired in the course of the business it becomes the property (trading assets) of the firm , a partner is entitled only to his share of the profits, if any, accruing and upon dissolution to a share in the moneys realised which represents the value of the property. A partner, on retirement is entitled only to get his share of the partnership assets, as on the date of retirement, realised and converted into money after a deduction of the liabilities and prior charges He has no rights in immovable properties as such

The *karar* in the instant case cannot be said to convey any immovable property by a partner to another expressly or by necessary implication The recital that some immovable property had been given to the retiring partner had already taken place. It does not require registration for its validity.

Gopal Chetty v *Vijaraghavachariar*, L R. 1922 A.C. 1· 43 M L J. 305· I L R 45 Mad. 378 (P C), relied on

Samuvier v *Ramasubbier*, (1931) 60 M L J 527 I.L.R 55 Mad. 72 and *Joharmul* v. *Tejram Jagrup*, (1893) I.L.R 17 Bom 235, not approved

Appeal by Special Leave from the Judgment and Decree dated the 8th December 1958 of the Andhra Pradesh High Court in Second Appeal No 845 of 1953.†

Alladi Kuppuswami and *R. Gopalakrishnan*, Advocates, for Appellants.

N.C. Chatterjee and *S. G. Patwardhan*, Senior Advocates, *S Balakrishnan*, Advocate and *R Thiagarajan*, Advocate for *N.S Mani*, Advocate, with them, for Respondents Nos. 4, 7 and 8.

The Judgment of the Court was delivered by

Mudholkar, J.—In this appeal by Special Leave from a judgment of the High Court of Andhra Pradesh the question which arises for consideration is whether the interest of a partner in partnership assets comprising of movable as well as immovable property should be treated as movable or immovable property for the purposes of section 17 (1) of the Registration Act, 1908. The question arises in this way Members of two joint Hindu families, to whom we would refer for convenience as the Addanki family and the Bhaskara family, entered into partnership for the purpose of carrying on business of hulling rice, decorticating groundnuts etc. Each family had half share in that business. The capital of the

*C A No. 299 of 1961 21st January, 1966.

† (1959) 1 An W R 300 (F B)

partnership consisted, among other things, of some lands belonging to the families During the course of the business of the partnership some more lands were acquired by the partnership. The plaintiffs who are two members of the Addanki family instituted a suit in the Court of Subordinate Judge, Chittoor on 4th March, 1949, for the following reliefs:

"(*a*) for a declaration that the suit properties belong to the plaintiffs and defendants 10 to 14 and defendants 1 to 9 equally, for a division of the same into four equal shares, one share to be delivered to the plaintiffs or for a division of the same into two equal shares to be delivered to the plaintiffs and the defendants 10 to 14 jointly;

(*b*) or in the alternative dissolving the partnership between the plaintiffs and defendants 10 to 14 on the one hand and defendants 1 to 9 on the other hand directing accounts to be taken ;

(*c*) directing the defendants 1 to 9 to render accounts of the income of the suit properties.

(*d*) directing the defendants 1 to 9 to pay the costs of the suit to the plaintiffs ;

(*e*) and pass such further relief as may be deemed fit in the circumstances of the case"

It may be mentioned that in their suit the plaintiffs made all the members of the Bhaskara family as defendants and also joined those members of the Addanki family who had not joined as plaintiffs We are concerned here only with the defence of the members of the Bhaskara family. According to them the partnership was dissolved in the year 1936 and accounts were settled between the two families. In support of this plea they have relied upon a *karar* executed in favour of Bhaskara Gurappa Setty, who was presumably the *karta* of Bhaskara family by five members of the Addanki family, who presumably represented all the members of the Addanki family. Therefore, according to the Bhaskara defendants, the plaintiffs had no cause of action Alternatively they contended that the suit was barred by time In the view which we take it would not be necessary to consider the second defence raised by the Addanki family.

The relevant portion of the *karar* reads thus:

"As disputes have arisen in our family regarding partition, it is not possible to carry on the business or to make investment in future Moreover you yourself have undertaken to discharge some of the debts payable by us in the coastal parts in connection with our private business. Therefore, from this day onwards we have closed the joint business. So, from this day onwards, we have given up (our) share in the machine etc, and in the business, and we have made over the same to you alone completely by way of adjustment You yourself shall carry on the business without ourselves having anything to do with the profit and loss Herefor, you have given up to us the property forming our Venkatasubbayya's share which you have purchased and delivered possession of the same to us even previously In case you want to execute and deliver a proper document in respect of the share which we have given up to you, we shall at your own expense, execute and deliver a document registered"

This document on its face shows that the partnership business had come to an end and that the Addanki family had given up their share in the "machine etc, in the business" and had made it over to the Bhaskara family It also recites the fact that the Addanki family had already received certain property which was purchased by the partnership presumably as that family's share in the partnership assets. The argument advanced by Mr Alladi Kuppuswami is that since the partnership assets included immovable property and the document records relinquishment by the members of the Addanki family of their interest in those assets, this document was compulsorily registrable under section 17 (1) (*c*) of the Registration Act and that as it was not registered it is inadmissible in evidence to prove the dissolution of the partnership as well as the settlement of accounts

Direct cases upon this point of the Courts in India are few but before we examine them it would be desirable to advert to the provisions of the Partnership Act itself bearing on the interest of partners in partnership property Section 14 provides that subject to contract between the partners the property of the firm includes all property originally brought into the stock of the firm or acquired by the firm for the purposes and in the course of the business of the firm Section 15 provides that such property

shall ordinarily be held and used by the partners exclusively for the purposes of the business of the firm. Though that is so a firm has no legal existence under the Act and the partnership property will, therefore, be deemed to be held by the partners for the business of the partnership. Section 29 deals with the rights of a transferee of a partner's interest and sub-section (1) provides that such a transferee will not have the same rights as the transferor partner but he would be entitled to receive the share of profits of his transferor and that he will be bound to accept the account of profits agreed to by the partners. Sub-section (2) provides that upon dissolution of the firm or upon a transferor-partner ceasing to be a partner the transferee would be entitled as against the remaining partners to receive the share of the assets of the firm to which his transferor was entitled and will also be entitled to an account as from the date of dissolution Section 30 deals with the case of a minor admitted to the benefits of partnership Such minor is given a right to his share of the property of the firm and also a right to a share in the profits of the firm as may be agreed upon. But his share will be liable for the acts of the firm though he would not be personally liable for them. Sub-section (4) however, debars a minor from suing the partners for accounts or for his share of the property or profits of the firm save when severing his connection with the firm It also provides that when he is severing his connection with the firm the Court shall make a valuation of his share in the property of the firm. Sections 31 to 38 deal with incoming and outgoing partners. Some of the consequences of retirement of a partner are dealt with in sub-sections (2) and (3) of section 32 while some others are dealt with in sections 36 and 37 Under section 37 the outgoing partner or the estate of a deceased partner, in the absence of a contract to the contrary, would be entitled to at the option of himself or his representatives to such share of profits made since he ceased to be a partner as may be attributable to the property of the firm or to interest at the rate of six per cent per annum on the amount of his share in the property of the firm. The subject of dissolution of a firm and the consequences are dealt with in Chapter VI, sections 39 to 55. Of these the one which is relevant for this discussion is section 48 which runs thus:

"In settling the accounts of a firm after dissolution the following rules shall, subject to agreement by the partners, be observed·

(*a*) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportions in which they were entitled to share profits.

(*b*) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order —

(*i*) in paying the debts of the firm to third parties;

(*ii*) in paying to each partner rateably what is due to him from the firm for advances as distinguished from capital;

(*iii*) in paying to each partner rateably what is due to him on account of capital; and

(*iv*) the residue, if any, shall be divided among the partners in the proportions in which they were entitled to share profits."

From a perusal of these provisions it would be abundantly clear that whatever may be the character of the property which is brought in by the partners when the partnership is formed or which may be acquired in the course of the business of the partnership it becomes the property of the firm and what a partner is entitled to is his share of profits, if any, accruing to the partnership from the realisation of this property, and upon dissolution of the partnership to a share in the money representing the value of the property. No doubt, since a firm has no legal existence, the partnership property will vest in all the partners and in that sense every partner has an interest in the property of the partnership. During the subsistence of the partnership, however, no partner can deal with any portion of the property as his own Nor can he assign his interest in a specific item of the partnership property to anyone. His right is to obtain such profits, if any, as fall

to his share from time to time and upon the dissolution of the firm to a share in the assets of the firm which remain after satisfying the liabilities set out in clause (*a*) and sub-clauses (*i*), (*ii*) and (*iii*) of clause (*b*) of section 48. It has been stated in Lindley on Partnership 12th ed at p. 375:

"What is meant by the share of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only which on the death of a partner passes to his representatives, or to a legatee of his share ..... and which on his bankruptcy passes to his trustee"

This statement of law is based upon a number of decisions of the English Courts One of these is *Rodriguez* v. *Speyer Bros.*,[1] where at p. 68 it has been observed:

"When a debt due to a firm is got in no partner has any definite share or interest in that debt, his right is merely to have the money so received applied, together with the other assets, in discharging the liabilities of the firm, and to receive his share of any surplus there may be when the liquidation has been completed"

No doubt this decision was subsequent to the enactment of the English Partnership Act of 1890 Even in several earlier cases, as for instance, *Darby* v. *Darby*,[2] the same view has been expressed. That was a case where two persons purchased lands on a joint speculation with their joint monies for the purpose of converting them into building plots and reselling them at a profit or loss It was held by Kindserley V. C that there was a conversion of the property purchased out and out and upon the death of one of the partners his share in the part of the unrealised estate passed to his personal representatives. After examining the earlier cases the learned Vice-Chancellor observed at p. 995:

"The result then of the authorities may be thus stated —Lord Thurlow was of opinion that a special contract was necessary to convert the land into personality and Sir W Grant followed that decision Lord Eldon on more than one occasion strongly expressed his opinion that Lord Thurlow's decision was wrong Sir J Leach clearly decided in three cases that there was conversion out and out, and Sir L Shadwell, in the last case before him, clearly decided in the same way That is the state of the authorities.

Now it appears to me that, irrespective of authority, and looking at the matter with reference to principles well established in this Court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personality, and effects a conversion out and out"

He then observed.

"This principle is clearly laid down by Lord Eldon in *Crawshay* v *Collins*[3] and by Sir W. Grant in *Featherstonhaugh* v *Fenwick*[4] and the right of each partner to insist on a sale of all the partnership property, which arises from *what is implied in the contract of partnership*, is just as stringent as a special contract would be If, then, this rule applies to ordinary stock-in-trade, why should it not apply to *all* kinds of partnership property? Suppose that partners, for the purpose of carrying on their business, purchase, out of the funds of the partnership, lease hold estate, or take a lease of land, paying the rent out of the partnership funds, can it be doubted that the same rule which applies to ordinary chattels would apply to such leasehold property? I do not think it was ever questioned that, on a dissolution, the right of each partner to have the partnership effects sold applies to leasehold property belonging to the partnership as much as to any other stock-in-trade No one partner can insist on retaining his share unsold. Nor would it make any difference in whom the legal estate was vested, whether in one of the partners or in all, this Court would regulate the matter according to the equities And Sir W. Grant so decided in *Featherstonhaugh* v *Fenwick* [4]"

We have quoted extensively from this decision because of the argument that the decision in *Rodriguez's case*,[1] would have been otherwise but for section 22 of the English Act. Adverting to this Lindley has said

"From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership, whether its property consists of land or not, must, as between the real and personal

1. L R (1919) A C 59.
2. (1856) 61 E. R. 992.
3. (1808) 15 Ves 218
4. (1810) 17 Ves. 298.

representatives of a deceased partner, be deemed to be personal and not real estate, unless indeed such conversion is inconsistent with the agreement between the parties Although the decisions upon this point were conflicting, the authorities which were in favour of the foregoing conclusion certainly preponderated over the others, and all doubt upon the point has been removed by the Partnership Act, 1890, which contains the following section:

'22 "Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representative of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or movable and not real or heritable estate'."

Even in a still earlier case [*Foster* v. *Hale*[1]] a person attempted to obtain an account of the profits of a colliery on the ground that it was partnership property and it was objected that there was no signed writing, such as the Statute of Frauds required. Dealing with it the Lord Chancellor observed·

"That was not the question it was whether there was a partnership The subject being an agreement for land, the question then is whether there was a resulting trust for that partnership by operation of law. The question of partnership must be tried as a fact, and as if there was an issue upon it. If by facts and circumstances it is established as a fact that these persons were partners in the colliery, in which land was necessary to carry on the trade, the lease goes as an incident. The partnership being established by evidence upon which a partnership may be found, the premises necessary for the purposes of that partnership are by *operation of law* held for the purposes of that partnership."

It is pointed out by Lindley that this principle is carried to its extreme limit by Vice-Chancellor Wigram in *Dale* v. *Hamilton*[2]. Even so, it is pointed out that it must be treated as a binding authority in the absence of any decision of the Court of Appeal to the contrary.

It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive right over any property which he has brought in, much less over any other partnership property. He would not be able to exercise his right even to the extent of his share in the business of the partnership As already stated his right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or with his retirement from partnership of the value of his share in the net partnership assets as on the date of dissolution or retirement after a deduction of liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would be only that which is permitted by section 29 (1), that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners. There are not many decisions of the High Courts on the point. In the few that there are the preponderating view is in support of the position which we have stated In *Joharmal* v. *Tejram Jagrup*[3] which was decided by Jardine and Telang, JJ., the latter took the view that though a partner's share does not include any specific part of any specific item of partnership property, still where the partnership is entitled to immovable property, such share does include an interest in immovable property and, therefore, every instrument operating to create or transfer a right to such share requires to be registered under the Registration Act In coming to this conclusion he mainly purported to rely upon an observation contained in the fifth edition of Lindley on Partnership at p. 347. This observation is not to be found

1 (1800) 5 Ves. 308. 2 Ph 266
2. (1846) 5 Hare 369 on appeal to (1847) 3 (1893) I.L.R. 17 Bom. 235.

in the present edition of Lindley's Partnership nor in the 9th or 10th editions which were brought to our notice. The 5th edition, however, is not available. The learned Judge after quoting an earlier statement which is that the "doctrine merely amounts to this that on the death of a partner his share in the partnership property is to be treated as money, not as land" says :

> "This obviously would not affect matters either during the lifetime of a partner—Lindley, L J., says in so many words that it has no practical operation till his death (p. 348)—or as against parties strangers to the partnership, *e.g*, the firm's debtors"

While it is true that the position so far as third persons are concerned would be different it may be pointed out that in *Forbes* v. *Steven*[1] James, V C, has, as quoted by the learned Judge, said :

> "It has long been the settled law of this Court that real estate bought or acquired by a partnership for partnership purposes (in the absence of some controlling agreement or direction to the contrary) is, as between the partners and as between the real and personal property, and devolves and is distributable and applicable as personal estate and as legal assets"

Telang, J., seems to have overlooked, and we say so with great respect, the words "as between the partners" which precede the words "and as between the real and personal representative of the partner deceased" and to have confined his attention solely to the latter We have not found in any of the editions of Lindley's Partnership an adverse criticism of the view of the Vice-Chancellor But, on the contrary as already stated, the view expressed is in full accord with these observations. Jardine, J., has discussed the English authorities at length and after referring to the documents upon which reliance was placed on behalf of the defendant stated his opinion thus :

> "To lay down that the three letters in question, which deal generally with the assets, movable and immovable, without specifying any particular mortgage or other interest in real property require registration, would, I incline to think, in the present state of the authorities, go too far It may be argued that such letters are not 'instruments of gift of immovable property' but rather disposals of a share in a partnership of which the business is money lending, and the mortgage securities merely incidental thereto."

The view of Telang, J, was not accepted by the Madras High Court in *Chitturi Venkataratnam* v *Subba Rao.*[2] The learned Judges there discussed all the English decisions as also the decision in *Sudarsanam Maistri* v. *Narasimhulu Maistri*[3] and *Gopala Chetty* v. *Vijayaraghavachariar*[4] and the opinion of Jardine, J, in *Joharmal's case*[5] and held that an unregistered deed of release by a partner of his share in the partnerhip business is admissible in evidence, even where the partnership owns immovable property. The learned Judges pointed out that though a partner may be a co-owner in the partnership property he has no right to ask for a share in the property but only that the partnership business should be wound up including therein the sale of immovable property and to ask for his share in the resulting assets. This decision was not accepted as laying down the correct law by a Division Bench of the same High Court in *Samuvier* v. *Ramasubbier*[6] The learned Judges there relied upon the decision in *Ashworth* v. *Munn*[7] in addition to the opinion of Telang, J, and also referred to the decision in *Gray* v *Smith*[8] in coming to a conclusion contrary to the one in the earlier case It may be pointed out that the learned Judges have made no reference to the decision of the Privy Council in *Gopala Chetty's case*[4] though that was one of the decisions relied upon by Philips, J., in the earlier case. In so far as *Ashworth's case*[7] is concerned that was a case which turned on the provisions of the Mortmain Acts and is not quite pertinent for the decision on the point which

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1. L R. (1870) 10 Eq. 178
2. (1926) 51 M L.J. 410: I.L R 49 Mad 738.
3. (1902) 11 M L.J 353: I.L.R. 25 Mad 149
4. L R. (1922) 1 A.C. 488 I L.R 45 Mad. 378
5. (1893) I L R 17 Bom 235
6. (1931) 60 M L J 527: I L R. 55 Mad 72.
7. (1880) 15 Ch D 363.
8. (1889) 43 Ch. D 208.

was before them and which is now before us. In *Gray* v. *Smith*[1] Kekewich, J., held that an agreement by one of the partners to retire and to assign his share in the partnership assets including immovable property, is an agreement to assign an interest in land and falls within the Statute of Frauds. The view of Kekewich, J, seems to have received the approval of Cotton L J, one of the Judges of the Court of Appeal, though no argument was raised before it challenging its correctness It may, however, be observed that even according to Kekewich, J, the authorities (*Foster* v. *Hale*[2] and *Dale* v. *Hamilton*[3]) establish that one may have an agreement of partnership by parol, notwithstanding that the partnership is to deal with land. He, however, went on to observe :

> " But it does not seem to me to follow that an agreement for the dissolution of such a partnership need not be expressed in writing, or rather that there need not be a memorandum of the agreement for dissolution when one of the terms of the agreement, either expressly or by necessary implication, is that the party sought to be charged must part with and assign to others an interest in land. That seems to me to give rise to entirely different consideration In the one case you prove the partnership by parol, you prove the object, the terms of the partnership, and so on. But in the other case it is one of the essential terms of the agreement that the party to be charged shall convey an interest in land, and that seems therefore to bring it necessarily within the 4th section of the Statute of Frauds."

In the case before us, as also in *Samuvier's case*[4] the document cannot be said to convey any immovable property by a partner to another expressly or by necessary implication If we may recall, the document executed by the Addanki partners in favour of the Bhaskara partners records the fact that the partnership business has come to an end and that the latter have given up their share in "the machine etc, and in the business" and that they have "made over same to you alone completely by way of adjustment". There is no express reference to any immovable property herein No doubt, the document does recite the fact that the Bhaskara family has given to the Addanki family certain property. This, however, is merely a recital of a fact which had taken place earlier. To cases of this type the observations of Kekewich, J., which we have quoted do not apply. The view taken in *Samuvier's case*[4] seemed to commend itself to Varadachariar, J., in *Thirumalappa* v. *Ramappa*[5] but he was reversed in *Ramappa* v. *Thirumalappa* [6]

We may also refer to the decision of a Full Bench in *Ajudhia Pershad Ram Pershad* v *Sham Sunder and others*,[7] in which Cornelius, J, has discussed most of the decisions we have earlier referred to, in addition to several others and reached the conclusion that while a partnership is in existence, no partner can point to any part of the assets of the partnership as belonging to him alone After examining the relevant provisions of the Act, the learned Judge observed :

> " These sections require that the debts and liabilities should first be met out of the firm property and thereafter the assets should be applied in rateable payment to each partner of what is due to him firstly on account of advances as distinguished from capital and, secondly on account of capital, the residue, if any, being divided rateably among all the partners It is obvious that the Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the firm and it will, therefore, be correct to say that, for the purposes of the Indian Partnership Act, and irrespective of any mutual agreement between the partners, the share of each partner is, in the words of Lindley ' his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged' "

This indeed is the view which has commended itself to us.

Mr Kuppuswamy then referred us to two decisions of English Courts in In re: *Fuller's Contract*[8] and *Burdett Coutts* v *Inland Revenue Commissioners*[9] and on the passage at pages 394 and 395 in Lindley's Partnership under the head

1. (1889) 43 Ch D 208.
2. (1800) 5 Ves 308
3. (1846) 5 Hare 369 on appeal to (1847) 2 Ph 266
4. (1931) 60 M.L J. 527: I L.R. 55 Mad 72.
5. A I R. 1938 Mad. 133.
6. A.I R 1939 Mad 884
7. A I R 1947 Lah 13 (F B.).
8. L R (1933) Ch D 652.
9. (1960) 1 W L R. 1027.

"Form of Transfer" in support of his argument Both the cases relied upon deal with contracts with third parties and not with agreements between partners *inter se* concerning retirement or dissolution The passage from Lindley deals with a case where there is an actual transfer of immovable property and is, therefore, not in point

Mr Chatterjee brought to our notice some English decisions in addition to those we have adverted to in support, which agree with the view taken in those cases He has also referred to the decisions in *Prem Raj Brahmin* v *Bhani Ram Brahmin*[1] and *Firm Ram Sahaymall* v *Bishwanath Prasad*[2] We do not think it necessary to discuss them because they do not add to what we have already said in support of our view.

For these reasons we uphold the decree of the High Court and dismiss the appeal with costs

K. G S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT —P B GAJENDRAGADKAR, *Chief Justice*, K N. WANCHOO, J. C. SHAH, J R MUDHOLKAR AND S M SIKRI, JJ

The Joint Chief Controller of Imports and Exports, Madras (In all the Appeals) . *Appellant**

v.

M/s Aminchand Mutha etc . *Respondents*

Imports and Exports Control Act (XVIII of 1947) and Imports Control Order (1955)—Red-book of Rules and Procedure for Import trade control for period January—June, 1957—Instructions 71 and 72—Scope—Approval of Chief Controller to division of quota between partners on dissolution—Relates back to date of dissolution—Recognition of quota certificates admissible to partners of dissolved firm after expiry of licensing period—If ground for refusing licence

By Majority —Where a firm is dissolved and the partners agree to divide the business, assets and liability the partners shall get their respective share in the quota rights (granted to the firm as established importers) according to the terms of the agreement Such rights would accrue to each of the partners from the date of the agreement Even where the approval of the Chief Controller is made after the licensing period for which application has been made is over the approval dated back to the time when the firm was dissolved and the agreement to divide the quota rights was made The licensing authority has therefore to deal with the application for licence on the basis that the approved quotas were given to the partners of the dissolved firm from the date of the agreement and cannot refuse the licence only on the ground that the approval was granted after the import period had expired

Joint Controller v *H V Jain*, (1959) 2 M L J 308 (1959) M L J (Crl) 737 I L R (1959) Mad 850, approved and *Jagannath* v *Varadkar*, A I R 1961 Bom 244 overruled

Per *Mudholkar, J* —The application made by a person on a form meant for established importers must be deemed to be a defective one if on the date on which he made it his rights in the quota had not been recognised and he was not an established importer The subsequent recognition of his share in the quota does not validate the application

Appeals by Special Leave from the Judgments and Orders dated 10th December, 1962, and 18th March, 1963, of the Madras High Court in Writ Appeals Nos. 27, 47 and 48 of 1961, and 74 of 1963, 91 of 1960 and 26, 49 and 50 of 1961.

C K Daphtary, Attorney-General for India, (*K P R Shankar Dass*, Advocate and *R. H Dhebar* and *R. N Sachthey*, Advocates, with him), for Appellant (In all the Appeals)

A V Viswanatha Sastri, Senior Advocate, (*S Balakrishnan* and *B R. Dolia* Advocates, and *R K Garg, S C Agarwal, D P Singh* and *M K Ramamurthi*, Advocates of *M/s Ramamurthi & Co* , with him) for Respondents (In C As Nos 60 to 62 of 1965)

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1. I L R (1946) 1 Cal 191. 2 A I R 1963 Pat 221

*C As Nos 60 to 62 and 316 to 320 of 1965. 21st July, 1965.

Miss Lily Thomas, Advocate, for Respondent (In C A No 316 of 1965).

B R. Dolia, E. C Agarwala and *P C. Agrawala*, Advocates, for Respondents (In C As. Nos. 317 to 320 of 1965).

The Court delivered the following Judgments .—

Wanchoo, J (*For the majority*) —These eight appeals by Special Leave against the judgment of the Madras High Court raise a common question of law and will be dealt with together It will be enough if we give the facts of one case *Joint Chief Controller* v *Amin Chand Mutha* (C A No 60 of 1965) for the facts in the other cases are more or less similar It appears that there was a partnership firm known as Nainmull Juthmull This firm had a quota for import of certain things, as it was an 'established importer' Established importers used to be given quotas every year and thereafter licences used to be issued to such importers, on the basis of the quota allotted to them The quota was not inheritable or transferable, but under certain circumstances to which we shall refer later it could be divided between partners where the quota-holder was a firm The firm in the present case had three partners, namely, Amin Chand Mutha, Nainmull Nathmull and Juthmull Mutha On 1st January, 1957, the firm was dissolved Consequently in accordance with the instructions contained in what is known as the Red Book, application was made on 25th March, 1957, by one of the partners (Amin Chand Mutha) for the grant of a licence with respect to the period January—June, 1957. It was noted in the application that quota certificates had been issued in favour of the firm Nainmull Juthmull of which the applicant was a partner. That firm had been dissolved and application had been made to the Chief Controller of Imports, New Delhi for division of the quota of the firm between the three partners of the firm who had separated It may be mentioned that application for licence had to be made before the 31st of March of the January—June, 1957 period.

It was stated that the application had already been made to the Chief Controller on behalf of the dissolved firm on 4th March, 1957, for division of the quota between the three partners and was pending when the application for licence was made by Amin Chand Mutha on 25th March, 1957 The application for licence had to be made to the Joint Chief Controller of Imports at Madras where the partners of the dissolved firm were carrying on business The Joint Chief Controller informed the respondent on 8th April, 1957, that before any licence could be given to him he should get the approval of the Chief Controller about the division of the quota rights of the dissolved firm It appears that there was some delay in the office of the Chief Controller for reasons into which it is unnecessary to go, and the Chief Controller informed the partner concerned in September, 1957 that instructions had been issued to the licensing authority to the effect that quota certificates admissible to the dissolved partnership firm should in future be divided between the three partners in certain proportions which it is unnecessary to set out. Thereafter the Joint Chief Controller was approached to grant a licence But on 9th January, 1958, the Joint Chief Controller informed the partner concerned that it was regretted that his request for the issue of licence for the period January—June, 1957 could not be acceded to since the transfer of quota rights in his favour had been recognised by the Chief Controller only after the expiry of the licensing period to which the application related It appears that there was then an appeal from this order of the Joint Chief Controller which failed Then came the writ petition to the High Court in December, 1958 or January, 1959, and the main contention on behalf of the respondents was that the Joint Chief Controller could not refuse the issue of licences on the ground that the Chief Controller's approval as to the division had been made after the period of January—June, 1957 had come to an end The High Court allowed the petition holding, on the basis of an earlier decision of that Court in the *Joint Controller* v *H V Jain*[1], that the approval of the Chief Controller to the division of the quota between partners of a dissolved firm related back to the date of the dissolution of the firm and the partners would be

1. (1959) 2 M.L J 308 : (1959) M.L J. (Crl) 737 I L R. (1959) Mad. 850.

entitled to import licences on the basis of such approval subject to the licensing order Thereupon the Joint Chief Controller went in appeal and the Division Bench of the High Court which heard the appeals upheld the order of the learned Single Judge The High Court having refused leave to appeal, the appellant obtained Special Leave from this Court, and that is how the matter has come up before us

Before we consider the point raised in the present appeals we shall briefly refer to the system of licensing which came into force after the Imports and Exports (Control) Act (XVIII of 1947), (hereinafter referred to as the Act) By section 3 of the Act, the Central Government was given power to provide for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions, if any, as may be made by or under the order, the import export, carriage coastwise or shipment as ship stores of goods of any specified description. This could be done by means of order published in the official gazette. The Act also made by section 5 any contravention of any order made and deemed to have been made under the Act punishable and by section 6 provided for congnizance of offences against the provisions of the Act

In pursuance of the power granted to the Central Government, the Imports (Control) Order was issued on 7th December, 1955 (hereinafter referred to as the Order). This Order repealed the earlier orders issued under the Act or the Defence of India Rules, 1939 It provided for a system of licensing and Rule 3 thereof provided that no person shall import any goods of the description specified in Schedule I, except under and in accordance with a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II Form of application for licences and fees payable therefor are provided in Rule 4 and Rule 5 provides for conditions to be imposed on a licensee at the time of granting licences Rule 6 gave power to the Central Government or the Chief Controller to refuse to grant a licence or direct any licensing authority not to grant licence for certain reasons One of the reasons for such refusal was if the application for import licence was defective, and did not conform to the prescribed rules Rule 7 provided for amendment of licences and Rule 8 gave power to the Central Government or the Chief Controller to suspend the issue of licences or debar a licencee from using a licence for certain reasons Rule 9 provided for cancellation of licences by the Central Government or any other officer authorised in this behalf The power under Rules 7, 8 and 9 was to be exercised after giving a reasonable opportunity of being heard to the licencees

These are the statutory provisions under the Act and the Rules for granting licences In order however to guide the licensing authorities in the matter of granting import licences, the Central Government issued certain administrative instructions to be followed by the licensing authorities These instructions provided for grant of import licences to three kinds of persons—(i) established importers, (ii) actual users, and (iii) new comers ; (see the Red Book of Rules and Procedure for Import Trade Control for the period January—June, 1957) We are in the present appeals concerned with established importers and may briefly indicate how established importers were dealt with in he Red Book concerned "Established importers" were defined as persons or firms who had been actually engaged in import trade of the articles comprised in the Schedule during at least one financial year falling within the basic period The basic period out of which the established importer could select the best year for the purpose of calculating the quota was from 1st April, 1945 to 31st March, 1952 Procedure was provided in these instructions for applications and for establishment or refixation of quotas · (*see* Section 1 of the Red Book for the period January—June, 1957, Instruction 22).

After setting out the system of granting quotas to established importers on the basis of their past imports, Instruction 71 with which we are particularly concerned, laid down that quotas were granted on the pre-supposition that no change had taken place in the constitution of the firm The expression "firm" included a partnership, a limited company and a proprietary business. It was further

provided that when a change occurred in the constitution or the name of a firm or the business changed hands, the reconstituted firm would not be entitled to the quota of the original firm until the transfer of the quota rights in their favour had been approved by the Chief Controller or other licensing authority, as the case may be Instruction 71 also provided how the transter of quota rights would be recognised or approved. In the present case we are concerned with clause (*b*) of Instruction 71, which is in these terms :—

> " Where a firm is dissolved and the partners agree to divide its business, assets and liabilities, and its goodwill is taken over by one of the partners or none of them is allowed to use it, the partners shall get their respective share in the quota rights according to the provision of the agreement."

Instruction 72 provided for documentary evidence to be produced by the applicants in support of their case for transfer of quotas.

It will be seen that these administrative instructions do not create any right as such in favour of persons with whom they deal They are for guidance of the authorities in the matter of granting quotas for the purpose of the Order That is why when clause (*b*) of Instruction 71 provides for division of quota rights it lays down that the partners shall get their respective share in the quota rights according to the provision of the agreement between them Once the Chief Controller is satisfied, on the evidence produced before him that the firm had certain quota rights and had been dissolved, he has to divide the quota rights between partners in accordance with the provisions of the agreement between them As we read clause (*b*), it is clear that where the conditions contained in Instruction 71 are fulfilled, the Chief Controller must divide the quota rights in accordance with the provisions of the agreement between the partners of the firm that has been dissolved. Clearly therefore these administrative instructions provide a machinery for division of quota rights in certain cases including the dissolution of a firm consisting of a number of partners and all that the Chief Controller has to do is to satisfy himself that there has been a dissolution in accordance with the provisions in clause (*b*) and thereafter he is bound to accord approval to the division of quota rights according to the provision of the agreement between the partners He cannot refuse to divide the quota rights between the partners of a dissolved firm where he is satisfied on the evidence produced before him that the conditions contained in clause (*b*) have been satisfied The function of the Chief Controller under Instruction 71 read with Instruction 72 appears more or less of a ministerial nature and he is bound to divide the quota rights in accordance with the provisions of the agreement between the partners of a dissolved firm, once he is satisfied on the evidence produced before him of such dissolution and the agreement leading to dissolution provides for the division of quota rights The division of quota rights according to the instructions is merely for the purpose of helping the licensing authority under the Order in the matter of grant of licence to the class of established importers with which this division is concerned The approval of the Chief Controller is provided by these instructions in order that the licensing authorities may have a clear guidance as to how they should deal with the quota allotted to a firm consisting of a number of partners which has been dissolved It is in the background of this position that we have to consider whether this approval granted by the Chief Controller relates back to the date of the agreement relating to the dissolution of the firm consisting of a number of partners.

Two views have been expressed by the High Courts in this behalf. The Madras High Court took the view in *Jain's case*[1] that

> " where a firm is dissolved and the partners agree to divide the business assets and liabilities, the partners shall get their respective share in the quota rights according to the terms of the agreement Such rights would accrue to each of the partners from the date of the agreement "

The Madras High Court further held that even where the approval of the Chief Controller is made after the licensing period for which application has been made

1. (1959) 2 M L J 308 (1959) M.L J (Crl.) 737 . I L R. (1959) Mad. 850

is over, the approval dated back to the time when the firm was dissolved and the agreement to divide the quota rights was made. The licensing authority therefore according to this view has to deal with the application for licence on the basis that the approved quotas were given to the partners of the dissolved firm from the date of the agreement and cannot refuse the licence only on the ground that the approval was granted after the import period had expired.

The other view is taken by the Bombay High Court in *Jagannath* v. *Varadhkar*[1]. It was held in that case that the transfer of quota rights was a condition precedent to the grant of an import licence The person in whose favour such a transfer had been recognised or sanctioned was consequently entitled to rely upon that transfer for a period subsequent to such sanction or recognition and not for any anterior period, even though the application for licence might have been made in proper time before the import period expired

We have given the matter careful consideration and are of opinion that the view taken by the Madras High Court is correct We have already pointed out that on a proper interpretation of Instruction 71, there is no doubt that the Chief Controller is bound to divide the quota of a firm consisting of partners which has been dissolved in accordance with the provisions of the agreement between the partners provided the necessary evidence has been produced before him, as required by Instruction 72 in that behalf Such being the nature of the proceeding before the Chief Controller it follows that when he gives approval to the division of the quota between the partners of a dissolved firm in accordance with the agreement between them, the approval must take effect from the date of the agreement between the partners. It might have been a different matter if the Chief Controller had the power to refuse division of the quota rights under these instructions , but he has no such power and must divide the quota in accordance with the agreement if he is satisfied as to the dissolution on the evidence produced in accordance with Instruction 72 If such approval by the Chief Controller were not to date back to the date of agreement it would mean that the partners who were otherwise entitled to approval under Instructions 71 and 72 might lose the advantage that they would have before the licensing authority by delay in the approval by the Chief Controller. In this connection our attention was drawn to the opening words in Instruction 71 which provided that " the reconstituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in their favour has been approved by the Chief Controller " It is true that these words make it necessary that they should be approval of the Chief Controller before a partner of a dissolved firm can say that he holds a quota But these words do not mean that such approval will not date back to the date of agreement dividing the quota rights, for the Chief Controller, as already indicated, has to divide the quota rights once he is satisfied as to dissolution on the production of evidence mentioned in Instruction 72. In such circumstances it would in our opinion be fair to hold that the Chief Controller's approval dates back to the date of agreement so that such persons may not suffer on account of the delay in the Chief Controller's office in the matter of according approval

The fact that in his letter of approval the Chief Controller usually says that the quota rights admissible to the dissolved partnership should *in future* be divided between the partners would not necessarily mean that the quotas for the partners were to take effect only after the date of approval If the division of quota has to be recognised by the Chief Controller on production of evidence required by Instruction 72 and this division has to be in accordance with the agreement between the partners of a dissolved firm, the approval must relate back to the date of agreement, for it is the agreement that is being recognised by the Chief Controller In such a case the fact that the Chief Controller says that in future the quota would be divided, only means that the original quota of the undissolved firm would from the date of the agreement of dissolution be divided between partners as provided thereunder

1. A.I R. 1961 Bom 244.

Further we should like to make it clear that quotas should not be confused with licences. Quotas are merely for the purpose of informing the licensing authority that a particular person has been recognised as an established importer for import of certain things Thereafter it is for the licencing authority to issue a licence to the quota holder in accordance with the licensing policy for the half-year with which the licence deals For example, if in a particular half-year there is an order of the Central Government prohibiting the import of certain goods which are within the quota rights, the licensing authority would be entitled to refuse the issue of licence for import of such goods whose import has been banned by the Central Government under the Act by notified order Thus the approval of the Chief Controller under Instruction 71 is a mere recognition of the division made by the partners of a dissolved firm by agreement between themselves and in that view the recognition must clearly relate back to the date of the agreement Further when the Chief Controller says in his letter that *in future* the division would be recognised in a certain ratio based on the agreement, it only means that the Chief Controller has approved of the divison made of the parties and such approval then must relate back to the date of the agreement between the parties We therefore hold that the view taken by the Madras High Court that the approval by the Chief Controller relates back to the date of agreement is correct.

It was next urged that the application when it was made to the Joint Chief Controller was not complete inasmuch as it did not mention what quota the particular partner had That is undoubtedly so, for the applications in the present cases stated that the firm had been dissolved and application had been made to the Chief Controller for division of the quota of the original firm between the partners according to the agreement between them. To that extent the application was defective It is pointed out that under Instruction 13 application for licence has to be made before a certain date and has to be complete in all respects It was further urged that it is always open to the Joint Chief Controller to reject an application which is defective and is thus incomplete Assuming that is so, one should have expected such a defective application being dismissed immediately after the last date for making the application had expired and the Joint Chief Controller should have given that as the reason for the rejection of the application for licence But this was not done in the present cases and the reasons for rejection of the application was not that it was not complete when made. Further it appears that it is not unusual for licences to be granted after the import period is over It is also not denied that it was open to the Chief Controller in his discretion to say that the division of quota rights would be recognised from the date of the agreement even though the approval came much later If that is so, it would mean that the applicant for division of quota would be entirely at the mercy of the Chief Controller because there is nothing in the Red Book to show under what circumstances the Chief Controller can grant recognition from the date of the agreement even though the approval comes much later On the whole therefore we are of opinion that the view taken by the Madras High Court is correct as the grant of approval in accordance with the agreement is obligatory on the Chief Controller if the evidence required under Instruction 72 has been produced to his satisfaction

The last point urged was that subsequent to October, 1957, Government of India changed its policy with respect to import of fountain pens with which some of the present appeals are concerned. This it was urged amounted to a ban on the import of fountain pens and it would not be open to the Joint Chief Controller to issue any licence for any period, be it January—June, 1957, after the import of fountain pens had been banned from October, 1957. Now there is no doubt that it is open to the Central Government under section 3 to prohibit the import of any article but that can only be done by an order published in the official gazette by the Central Government under section 3 The High Court has found that no such order under section 3 of the Act has been published. Nor has any such order by the Central Government been brought to our notice. All that has been said is that in the declaration of policy as to import, the word "nil" appears against fountain pens. That necessarily does not amount to prohibition of import of

fountain pens unless there is an order of the Central Government to that effect published in the official gazette We therefore agree with the High Court that unless such an order is produced it would be open to the licensing authority to issue a licence for the period of January—June, 1957 even after 1st October, 1957

The appeals therefore fail and are hereby dismissed with costs There will be one set of hearing fee

Mudholkar, J—A common question of law arises for decision in these appeals. The essential facts bearing on this question being more or less similar it would be sufficient to state those which give rise to Civil Appeal No 60 of 1965 A partnership firm styled as Nainmull Juthmull carried on, amongst other things, the business of importing goods from foreign countries As an established importer, the Joint Chief Controller of Imports and Exports, Madras had granted it a quota for import of certain commodities On the strength of this the firm used to be granted import licences every half-year There were three partners in that firm, namely, Aminchand Mutha, Naimull Nathmull and Juthmull Mutha On 1st January, 1957, the firm was dissolved On 25th March, 1957, Aminchand Mutha made an application to the appropriate authority for the grant of an import licence in respect of the period January—June, 1957, stating in his application the facts that the firm Nainmull Juthmull held a quota certificate, that the firm was dissolved and that an application was made to the Chief Controller of Imports for the division of the quota amongst the erstwhile partners of the firm That application had in fact been made on 4th March, 1957, and was pending on the date on which an import licence was applied for by Aminchand to the Joint Chief Controller of Imports and Exports at Madras On 8th April, 1957, the latter informed Aminchand that before a licence would be granted to him he should get the approval of the Chief Controller for the division of quota rights of the dissolved firm For certain reasons which are not material for the purpose of the appeal, there was delay in the disposal of the aforesaid application In September, 1957, the Chief Controller informed Aminchand that instructions would be issued to the Licensing Authority to the effect that quota certificates admissible to the dissolved firm should in future be divided between the three partners in certain proportions. Aminchand thereupon approached the Joint Chief Controller for grant of a licence and on 9th January, 1958, the latter informed him that no licence could be issued to him for the period January—June, 1957 since the division of quota rights of the firm was recognised by the Chief Controller only after the expiry of the licensing period to which the application related Aminchand then preferred an appeal from the decision of the Joint Chief Controller but failed Thereupon he moved a writ petition in the High Court of Madras for the issue of a writ of *mandamus* or any other appropriate writ to the Joint Chief Controller for the issue of an import licence to him for the period January —June, 1957 The High Court following its earlier decision in the *Joint Chief Controller* v *H V Jain*[1], granted the application It is against this decision of the High Court that the Joint Chief Controller has come up in appeal before this Court as also against similar decisions in the other connected appeals

The point which is urged on behalf of the respondents in these appeals is that the Joint Chief Controller is bound to grant an import licence for the period for which it was sought even though the division of quota rights was approved by the Chief Controller subsequent to the expiry of the licensing period provided that the application for the grant of the licence was made within time and an application for division of quota rights is made before the expiry of the licensing period The contention of Mr Viswanatha Sastri who appears for all these respondents is that in such cases the approval of the Chief Controller of the division of quota rights even though accorded after the expiry of the licensing period would relate back to the date of dissolution of the firm or at any rate to the date of the application for approval.

It would be appropriate to advert now to the legal position pertaining to the import of foreign goods. In the first place there is the Imports and Exports (Control)

1. (1959) 2 M.L.J 308 : (1959) M L J. (Crl.) 737 : I L R (1959) Mad 850.

Act, 1947 Sub-section (1) of section 3 of that Act amongst other things, provides that the Central Government may by order published in the Gazette prohibit, restrict or otherwise control in all cases or in specified classes of cases and subject to such exceptions, if any, as may be made by or under the order "(a) the import .. . . of goods of any specified description " Sub-section (2) makes the provisions of section 19, Sea Customs Act applicable to goods with respect to which any order under sub-section (1) of section 3 of the Imports and Exports (Control) Act, 1947 has been made. Sub-section (3) of that section provides as follows .

"Notwithstanding anything contained in the aforesaid Act, the Central Government may, by order published in the Official Gazette, prohibit, restrict or impose conditions on the clearance, whether for home consumption or for shipment abroad of any goods or class of goods imported into the Provinces of India "

Section 5 provides for certain penalties for contravention of any order made or deemed to have been made under the Act In exercise of the powers, conferred by section 3 the Government of India promulgated on 7th December, 1955, an Order for the control of import trade. Clause (3) thereof runs thus .

"*Restriction on import of certain goods*—Save as otherwise provided in this order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with a license or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II. "

Clause (4) (1) provides for making an application for grant of a licence to import. Clause (5) provides for attaching conditions to a licence issued under the Order. Clause (6) confers power on the Government of India or the Chief Controller of Imports and Exports to refuse to grant a licence for any of the reasons specified in that clause. Clause (8) empowers these authorities to suspend the issue of licences or debar a licencee from receiving licences and clause (9) provides for cancellation of licences The grounds on which action can be taken under either of these clauses are also specified in them It is not necessary to refer to the other clauses of this Order Appended to the Order are Schedules contemplated by clause (3) of the Order Amongst the grounds for refusal of licence under clause (6) the following are relevant for the purpose of deciding the point which arises before us .

" (*a*) if the application for a licence does not conform to any provision of this Order ,

* * * * * *

(*e*) if the application for an import licence is defective and does not conform to the prescribed rules ;

* * * * *

(*g*) if the applicant is not eligible for a licence in accordance with the Import Trade Control Regulation. "

Reading the Act and the Import Control Order together it would follow that no person is entitled to import into India goods or commodities included in Schedule I of the Order except in accordance with the provisions of the Act and of an Order promulgated thereunder by the Government of India or as permitted by that Order The Import Control Order, save in cases falling within clause (11) of that Order prohibits the import of any commodity set out in Schedule I except under a licence issued under the Order The granting of licences for import of commodities into India and the allotment of the requisite foreign exchange for the purpose is regulated by the policy framed in that behalf from time to time by the Government of India The commodities sought to be imported by each of the respondents are those included in Schedule I and could be imported only under a licence Each of them claims to be an established importer in the sense that he is entitled to a proportionate quota which had been allotted to the dissolved firm of which he was a member

The principles to be borne in mind while dealing with applications for licence for import are set out in what is known as " Red Book " which is issued by the Government from time to time with respect to each licensing period The title of the book is " Import Trade Control Policy " The procedure to be followed by the authority while dealing with applications for import licences is given not only in this book but also in what is called the " Hand-book " The Red Book in addition

to the instructions, also contains the "Policy Statement" which gives details of licensing policy for the particular licensing period dealt with in that book. The instructions divide the intending importers into four broad categories (*a*) established importer ; (*b*) actual users , (*c*) newcomers and (*d*) others who do not come in any of the above categories (see para 22 of the Hand-book) The share available to the applicants in these categories is fixed from time to time We are here concerned with category (*a*), that is, with established importers If a person or a firm is recognised as an established importer certain quota of imports is made available to that person or firm for the particular licensing period from out of the share in imports allotted to established importers. The expression "firm" used in the instructions is a wide one and includes a partnership, a limited company or a proprietary business The business of an exporter of a dissolved firm would thus fall within the definition Paragraph 71 of the Red Book provides that where a change occurs in the constitution or the name of a firm or the business changes hands the reconstituted firm will not be entitled to the quotas of the original firm *until the transfer of the quota rights in their favour has been approved* by the Chief Controller of Imports and Exports Sub-para (*a*) of Paragraph 71 deals with transfer of quota rights With this sub-paragraph we are not concerned Sub-paragraph (*b*) dealt with division of quota rights and reads thus .

> "(*b*) *Division of Quota Rights*—Where a firm is dissolved, and the partners agree to divide its business, assets and liabilities, and its goodwill is taken over by one of the partners or none of hem is allowed to use it, the partners shall get their respective share in the quota rights according to he provision of the agreement"

In these appeals we are concerned only with cases which fall under this sub-paragraph Consideration of all the provisions of the Act and the Order along with the instructions leaves no doubt that no person has a right to import a foreign commodity into India the import of which is prohibited Where however, the ban on import of foreign goods is permitted to be lifted in favour of a person who has obtained a licence for import under the Order he can make an application for grant of a licence But even then he must comply fully with the requirements specified in the Control Order and make the application in the prescribed form The instructions contained in the Hand-book and the Red Book including those in Paragraph 71 are meant for the guidance of the Licensing Authority and cannot be put higher than administrative instructions It would follow, therefore that such instructions woud not confer a legal right upon an exporter for the division of the quota rights of a dissolved firm and for treating him as an established importer though strictly speaking he was not one Once this position is reached there would be no difficulty in answering the question which we are called upon to decide Further, even though a firm is an established importer it cannot be said to possess a legal right to import according to its quota If the firm itself had no legal right to import according to its quota there is no room for saying that upon its dissolution each of its erstwhile members would acquire a right to import either in proportion to their respective shares in the firm or in the proportion provided for in the agreement whereunder the dissolution was effected or be entitled to be treated as an established importer The Government, however, with a view to ensure a fair administration of the licensing system has given instructions in Paragraph 71 of the Red Book to certain authorities to divide the quota rights of the dissolved firm in the manner provided in sub-para (*b*) The failure of the authority concerned to abide by these instructions may conceivably draw upon that authority certain consequences but would not confer any justiciable right upon any member of the erstwhile firm The action of the authority concerned could be rectified in an appeal to a superior authority Where, however, it is not so rectified the claimant to the quota right has no remedy at law However, in none of the cases before us has there been an arbitrary or unfair refusal to apply the instructions contained in sub-para (*b*)

Now, what has happened here is that though the applications for licences were made for a specified period within the time allowed they were rejected and the applicants were informed by the licensing authority that the division of quota rights would be given effect to only for future periods inasmuch as the divisions were

recognised by the appropriate authority after the expiry of the particular periods to which the applications for import licences related As rightly pointed out by my brother Wanchoo a quota right is not something which is transferable or heritable at law It would follow therefore that recognition of a division of quota rights and thus treating him as an established importer, though he was not one, is no more than a concession given by the appropriate authority in pursuance of administrative instructions Where, therefore, the recognition of a division of quota rights is accorded by the Chief Controller of Imports and Exports, as was done in these cases, only in respect of future imports, the erstwhile partner has no right to seek redress from a Court or even the High Court under Article 226 of the Constitution His position would be no better if upon that ground the licensing authority refused to grant a licence for a licensing period antecedent to the recognition of the division of quota rights The reason s that for an application for grant of a licence to be a proper application it must conform to the form prescribed in that behalf and that where it does not do so it is liable to be rejected The power conferred by clauses (*a*) (*e*) and (*g*) of the Control Order is available to the Licensing Authority for this purpose Here it is said that the respondent's application was defective because it does not conform to rules. It is not disputed that the application was made in Form A of Appendix IV which is a form for application by an established importer. This form is reproduced at page 319 of the Red Book for the period January-June, 1957. Item 8 of that form requires " General Information to be furnished " Sub-item 'h' is as follows:

> " Whether the constitution of the firm has undergone any change after the issue of the quota certificate to the firm ? If so, quota No and date of orders issued by the appropriate authority sanctioning transfer of quota rights in favour of the applicant "

This clearly shows that an application as an established importer can be made by a firm or person claiming the whole or a part of the quota only after the appropriate authority has sanctioned transfer of quota rights For, the information required by this sub-para to be furnished cannot possibly be furnished till the recognition of the division is accorded by the Chief Controller of Imports and Exports The consequence that would ensue, if an application is made for grant of a licence without furnishing the information required by this sub-para is that application would have to be treated as defective and would therefore, be liable to be rejected under clause (6) of the Control Order Here, on the respondent's own showing the appropriate authority had not recognised the division of the dissolved firm's quota rights by the date on which he made an application for grant of an import licence for the period January to June, 1957 He could thus claim to have been an established importer though he purported to apply for a licence upon the basis that he was one. I, therefore, hold that the Joint Chief Controller's action in refusing to grant a licence for that period was well within his powers It is said that in some other similar cases licences were issued by that authority That may or may not be a fact ; but even if it is fact it is not relevant for the purpose of determining whether the action of the authority was lawful or not For the respondent's petition is not based upon the ground that he has been unfairly discriminated against

It is, however, said that the recognition of the division must relate back to the date of the mutual dissolution of the firm or at least to the date of the application to the Chief Controller for recognition of the division A similar argument was advanced before a Bench of the Bombay High Court of which I was a member in *Jagannath Prabhashankar Joshi* v. *Varadkar*[1], and in rejecting it I observed as follows

> " There is one more thing which we would like to point out and that is that an application for the grant of an import licence to a firm, which has undergone a change in its constitution, could be made only after the sanction regarding transfer of the quota rights is issued in its favour That is what it provided in paragraph 13 Therefore, the application made by the petitioners to the first respondent on the 27th of December, 1957, cannot be regarded as a proper application at all This is made clear in the Form itself which amongst other things requires the following to be answered
>
> ' Whether the constitution of the firm has undergone any change after the issue of the quota certificate to the firm ? If so, quota No and date of orders issued by the appropriate authority sanctioning transfer of quota rights in favour of the applicant '

1. (1960) 63 Bom. L R 1.

It is clear from this position that unless the quota certificate in favour of the reconstituted firm is sanctioned by the Chief Controller of Imports and Exports, that firm would not be entitled to obtain an import licence on the ground of its being an established Importer and a grantee of a quota certificate "

The decision to the contrary in *Jain's case*[1], was also cited in *Jagannath's case*[2], and in particular the following observations therein

" We are in entire agreement with this reasoning Sub-clause (*b*) of paragraph 74 is quite clear that where a firm is dissolved and the partners agree to divide its business assets and liabilities the partners shall get their respective share in the quota rights according to the provisions of the agreement. Such rights would accrue to each of the partners from the date of the agreement The fact that approval of the agreement (assuming such approval is necessary) is given by the Chief Controller of Imports and Exports on a later date, it cannot be said that the rights of the partners would accrue only on and from the date of such approval The words 'in future' can be understood to mean 'from the date of the dissolution'. "

Dealing with them I observed as follows :

" With respect, we cannot accept the view taken by the learned Chief Justice and concurred in by the learned Judge In so far as quota rights are concerned, Chagla, C J, in an unreported judgment dated 17th March, 1957 in *Chimanlal Popatlal* v *B M Choksey*[3] observed as follows

' But this quota has no market-value , it is not ordinarily transferable or assignable It is merely a licence or a permit given to a particular party to enable him to import paper into India and as such it has no inherent value. '

Thus, according to this Court a quota right is not a ' property ' which is transferable in law If that view is correct—and with respect we think it is,—it follows that by reason of the dissolution of the partnership, no transfer takes place with respect to quota rights It is true, that the Import and Export Authorities are required to take into account a transfer of quota rights, but that is so, because of the instructions specifically issued in this regard by the Central Government and which are to be found in the book entitled " Import Trade Control Policy " These rights, such as they are, must be said to be a creation of the Government notifications and would necessarily be exercisable to the extent and in the manner provided in those notifications In paragraph 72 of the ' Import Trade Control Policy ' Book it is clearly laid down that when a change occurs in the constitution of a firm the reconstituted firm will not be entitled to the quotas of the original firm until the transfer of the quota rights in their favour has been approved by the Chief Controller of Imports and Exports It, therefore, follows that this transfer is a condition precedent to the grant of an import licence. The person in whose favour such a transfer has been recognised or sanctioned, would consequently be entitled to rely upon that transfer only for a period subsequent to such sanction or recognition and not for any anterior period The date of dissolution of the old firm has thus no relevance whatosever in so far as the grant of an import licence is concerned An import licence is granted by the Joint Chief Controller of Imports and Exports to a person not because he has acquired the rights of a dissolved partnership firm but because the transfer of the quota rights made in his favour is recognised by the Chief Controller of Imports and Exports We, therefore, agree with the learned single Judge that the transfer sanctioned by the second respondent could not entitle the petitioners to obtain an import licence in respect of a period prior to the grant of the sanction "

I still maintain the view that I took. I would, however, add that by saying ' the rights such as they are ', what I meant was that even if the transfer be said to confer rights, the rights themselves being the creation of the instructions contained in para. 72 of the Red Book (corresponding to para 71 of the Red Book for January-June, 1957) would arise only upon strict compliance with the instructions It is true that here there is no transfer by the firm of its quota rights but upon its dissolution there was a division of its quota rights by the erstwhile partners amongst themselves. Under sub-para (*a*) (iii) of para 71 no one would be entitled to the firms' quota but under sub-para (*b*) the quota would be distributed amongst the partners according to the provision in that behalf in the agreement of dissolution The case being one of the business of the firm changing hands as contemplated by the opening words of para 71 the approval of the Chief Controller of Imports and Exports to the division of quota rights was imperative This position has also not been challenged by Mr. Viswanatha Sastri.

In support of the contention that the approval of the Chief Controller of Imports and Exports would relate back to the date of dissolution it was contended that since the Chief Controller of Imports and Exports had no right to refuse to recognize a transfer (or the division of quota rights) the rights of the transferee would accrue to him as from the date of the transfer. I cannot accede to the proposition that in

1. (1959) 2 M L J. 308 : (1959) M.L.J. (Crl.) 737 I L R. (1959) Mad. 850.
2. (1960) 63 Bom, L R 1
3. Appeal No 12 of 1957

no circumstances can the Chief Controller of Imports and Exports refuse to recognise a transfer Indeed, in *Jagannath's case*[1], such recognition was refused on the ground that the requiemrents of the instructions had not been carried out It was only after the parties concerned carried them out by the subsequent execution of a proper document that the transfer was recognised There might conceivably be other cases in which recognition of transfer or division of quota rights could be properly refused The argument is, therefore, on its very face clearly untenable.

To sum up, the position is this The respondent made an application for grant of licence to import a commodity included in Schedule I to the Control Order upon a form meant to be used by an established importer On the date of the application he was not an established importer and was, therefore, incompetent to apply for an import licence upon the basis that he was an established importer No doubt, he was a member of a firm which was an established importer and held a quota right for import of commodities included in Schedule I No application was made by or on behalf of that firm because that firm had been dissolved before the respondents made an application for grant of import licence The right to a quota is not a legal right and it is only in pursuance of certain administrative instructions that the Licensing Authority allots quotas to established importers In pursuance of these instructions the Chief Controller of Imports and Exports is empowered to recognise the division of quota allotted to a firm which has been dissolved amongst the members of that firm They do not, however, create any legal right in favour of the erstwhile partners to a share in the quota of the dissolved firm The instructions, no doubt, provide that the division is to be recognised by the Chief Controller only for the future The plain meaning of this is that the division is to be made effective only from a date subsequent to the approval of the division by the Chief Controller Even assuming that these instructions confer some kind of right upon the partners of a dissolved firm it can be exercised only in the manner and to the extent provided in the instructions themselves Not only that the instructions do not provide for any relation back of the recognition of division by the Chief Controller of Imports and Exports to the date of dissolution of the firm but they clearly provide for the recognition of the division only in future That being the position the application made by a person on a form meant for established importers must be deemed to be a defective one if on the date on which he made it his rights in the quota had not been recognised and he was not an established importer The subsequent recognition of his share in the quota does not validate the application

In the result I would allow the appeals, set aside the judgment of the High Court and dismiss the writ petition with costs in all the Courts There will be only one hearing fee in all these appeals

ORDER OF THE COURT In accordance with the opinion of the majority the appeals are dismissed with costs One set of hearing fee

K S ——— *Appeals dismissed.*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT —K SUBBA RAO, M. HIDAYATULLAH AND R S BACHAWAT, JJ.

S Rama Iyer (deceased) thereafter his heirs and legal representatives .. *Appellants**

v.

Sundaresa Ponnapoondar . *Respondent*

Madras Cultivating Tenants Protection Act (XXV of 1955), section 6-B—Revisional jurisdiction of High Court—Power to interfere with finding of collateral fact—Finding (that a person applying is not a cultivating tenant) and refusing application—If liable to interference in revision

Civil Procedure Code (V of 1908), section 115—Scope

Where the Tribunal found summarily that the applicant was not a cultivating tenant of the respondent and on such a finding declined to exercise the jurisdiction vested in it by section 3 (3) of the

1. (1960) 63 Bom. L R. 1.

* C A. No 797 of 1963. 4th February, 1966.

Madras Cultivating Tenants Protection Act, 1955 to determine the correct rent due to the landlord (respondent) by the applicant the High Court had power to enquire into the correctness of this decision and on finding that the tenancy existed and the Tribunal had erroneously refused to exercise the jurisdiction vested in it by section 3 (3), the High Court could set aside the decision under sub-section (*b*) of section 115 of the Code of Civil Procedure read with section 6-B of the Cultivating Tenants Protection Act The High Court can on a review of the entire evidence come to the conclusion that the applicant was a cultivating tenant and grant relief accordingly

Appeal by Special Leave from the Judgment and Order, dated the 27th March, 1959, of the Madras High Court in C R P No. 1282 of 1958

R Ganapathy Iyer, Advocate, for Appellants

R Thiagarajan, Advocate, for Respondent.

The Judgment of the Court was delivered by

Bachawat, J —On 24th April, 1958, the respondent claiming to be the cultivating tenant of the appellant in respect of certain lands in Manapparavai vattam, Nannilam taluk deposited Rs 462 as rent for 1367 fasli in the Revenue Court (the Court of the Revenue Divisional Officer), Tanjore, under section 3 (3) of the Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955) and filed an application before the Court praying for a declaration that the amount deposited represented the correct amount of rent due from him The appellant denied that the respondent was his cultivating tenant On 31st July, 1958, the Revenue Court, Tanjore held that the respondent was not a cultivating tenant of the appellant and could not claim the benefit of section 3 (3) and dismissed the application The respondent filed a petition in revision before the Madras High Court under section 6-B of the Act read with section 115 of the Code of Civil Procedure The High Court came to the conclusion that the respondent was a cultivating tenant of the appellant and by its order dated 27th March, 1959, allowed the revision petition and declared that the amount deposited by the respondent represented the correct amount due from him to the appellant The appellant now appeals to this Court by Special Leave

Counsel for the appellant submitted that the finding of the Revenue Court that the respondent was not a cultivating tenant was a finding of fact and the High Court had no jurisdiction to set it aside on revision. On the other hand, Counsel for the respondent submitted that the finding was in respect of a collateral fact upon the existence of which the jurisdiction of the Revenue Court under section 3 (3) depended and the High Court had ample power to revise the finding under section 6-B of the Act Section 6-B is in these terms .

" The Revenue Divisional Officer shall be deemed to be a Court subordinate to the High Court for the purposes of section 115 of the Code of Civil Procedure, 1908 (Central Act V of 1908), and his orders shall be liable to revision by the High Court under the provisions of that section "

Section 6-B empowers the High Court to revise the decision of the Revenue Divisional Officer under section 115 of the Code of Civil Procedure, and for the purposes of the section, the Officer is deemed to be a subordinate Court Section 115 is in these terms :

" The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit. "

In the present case, no question of revision under sub-section (*c*) of section 115 arises, and we are concerned only with the power of revision under sub-sections (*a*) and (*b*) of section 115 Sub-section (*a*) empowers the High Court to correct an erroneous assumption of jurisdiction , sub-section (*b*) empowers it to correct an erroneous refusal of jurisdiction The decision of the subordinate Court on all questions of law and fact not touching its jurisdiction is final and however erroneous such a decision may be, it is not revisable under sub-sections (*a*) and (*b*) of section

115 On the other hand, if by an erroneous decision on a question of fact or law touching its jurisdiction, *e g*, on a preliminary fact upon the existence or which its jurisdiction depends, the subordinate Court assumes a jurisdiction not vested in it by law or fails to exercise a jurisdiction so vested, its decision is not final, and is subject to review by the High Court in its revisional jurisdiction under sub-sections (*a*) and (*b*) of section 115 The question is, on which side of the line the present case lies, and whether the decision of the Revenue Divisional Officer that the respondent is not a cultivating tenant of the appellant is subject to review by the High Court in its revisional jurisdiction The Revenue Divisional Officer is an inferior Court of limited jurisdiction functioning under the Madras Cultivating Tenants Protection Act, 1955 To ascertain the limit and extent of its jurisdiction, we must examine the provisions of the Act

The Act came into force on 27th September, 1955, and was amended from time to time Originally, the Act was temporary, recently it has been made permanent. The Act was passed for the protection of certain cultivating tenants from eviction Section 2 defines, *inter alia*, 'cultivating tenant' and 'landlord' 'Cultivating tenant' is a person who carries on personal cultivation on the land under a tenancy agreement, express or implied, and includes any person who continues in possession of the land after determination of the tenancy agreement and the heirs of such person "Landlord" means the person entitled to evict the cultivating tenant from his holding or a part of it Section 3 (1) protects the cultivating tenant from eviction at the instance of the landlord whether in execution of a decree or order of Court or otherwise Section 3 (2) sets out the grounds of eviction, and if one of these grounds is made out, the protection from eviction given by section 3 (1) is taken away Section 3 (3) enables the cultivating tenant to deposit the rent in Court Section 3 (3) (*b*) requires the Court to "cause notice of the deposit to be issued to the landlord and determine, after a summary enquiry, whether the amount deposited represents the correct amount of rent due from the cultivating tenant" The expression "Court" in section 3 (3) means the Court which passed the decree for order for eviction, or where there is no such decree or order, the Revenue Divisional Officer The Act also vests jurisdiction in the Revenue Divisional Officer to entertain and decide an application by the landlord for eviction of a cultivating tenant—section 3 (4), an application by cultivating tenants evicted before and after the commencement of the Act for restoration of possession—sections 4 (1) and 4 (5), an application by the landlord for the resumption of land for personal cultivation—section 4-A (1), an application by the cultivating tenant for restoration of possession from a landlord so resuming possession—section 4-A (2), applications for resumption of possession by the landlord from his cultivating tenant and by the cultivating tenant from his sub-tenant provided the applicant was a member of the Armed Forces—sections 4-AA (2) and 4-AA(3) On receipt of any upplication under sections 3 (4), 4 (1), 4 (5), 4-A (1), 4-A (2), 4-AA (2) and 4-AA (3), the Revenue Divisional Officer is required to hold a summary enquiry into the matter and pass necessary orders after giving a reasonable opportunity to the landlord and the tenant to make their representations Section 4-B empowers the Revenue Divisional Officer in the case of any tenancy to impose a penalty on the landlord or the cultivating tenant for his refusal to sign or failure to lodge a lease deed in accordance with its provisions. Section 6 provides that no Civil Court shall, except to the extent specified in section 3(3), have jurisdiction in respect of any matter which the Revenue Divisional Officer is empowered by or under the Act to determine, or shall grant an injunction in respect of any action taken or to be taken under such power Section 6-A requires the Civil Court to transfer to the Revenue Divisional Officer any suit for possession or injunction in relation to any land pending before it, if it is satisfied that the defendant is a cultivating tenant We have already noticed section 6-B, which confers powers of revision on the High Court Section 7 gives the State Government the power to make Rules.

The Act gives generous protection to cultivating tenants from eviction, and severely restricts the right of landlords to resume possession of their land from their cultivating tenants. In case of disputes between the landlord and the cultivating

tenant, the Revenue Divisional Officer is authorised to entertain and decide applications by the landord for eviction and resumption of possession and by the cultivating tenant for restoration of possession and to impose penalties on the landlord or the tenant for infraction of section 4-B. To attract the jurisdiction of the Revenue Divisional Officer, there must be a dispute between a landlord and cultivating tenant. The existence of the relation of landlord and cultivating tenant between the contending parties is the essential condition for the assumption of jurisdiction by the Revenue Divisional Officer in all proceedings under the Act. The Tribunal can exercise its jurisdiction under the Act only if such relationship exists If the jurisdiction of the Tribunal is challenged, it must enquire into the existence of the preliminary fact and decide if it has jurisdiction But its decision on the existence of this preliminary fact is not final; such a decision is subject to review by the High Court in its revisional jurisdiction under section 6-B The enquiry by the Tribunal is summary, there is no provision for appeal from its decision, and the Legislature could not have intended that its decision on this preliminary fact involving a question of title would be final and not subject to the overriding powers of revision by the High Court.

In the present case, the Tribunal found that the respondent was not the cultivating tenant of the appellant, and on such finding declined to exercise the jurisdiction vested in it by section 3 (3) to determine the correct amount of rent due by the respondent to the appellant. The High Court had power to enquire into the correctness of this decision, and on finding that the tenancy existed and the Tribunal had erroneously refused to exercise the jurisdiction vested in it by section 3 (3), the High Court could set aside the decision under sub-section (*b*) of section 115 of the Code read with section 6-B of the Act On a review of the entire oral and documentary evidence, the High Court found that the respondent was the cultivating tenant of the appellant. It is not shown that this finding is erroneous. We see no reason for interfering with the decision of the High Court.

The appeal is dismissed. There will be no order as to costs.

K.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, J C. SHAH, S M. SIKRI, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ

M/s. K.G. Khosla & Co. (P.) Ltd., Delhi . *Appellant**

v.

The Deputy Commissioner of Commercial Taxes, Madras Division, Madras .. *Respondent.*

Central Sales Tax Act (LXXIV of 1956), section 5 (2)—Sales in course of import—Not liable to tax—Test.

It is wrong to say that before a sale could be said to have occasioned import it is necessary that the sale should have preceded the import. The expression " occasions the movement of goods" occurring in section 3 (*a*) and section 5 (2) of the Central Sales Tax Act must have the same meaning. Where the assessee contracted to supply axle box bodies to be manufactured in Belgium the goods to be inspected and certified in the factory, before the import of such goods in pursuance of such contract the sales are in the course of import of goods within section 5 (2) of Central Sales Tax Act.

Appeals by Special Leave from the Judgment and Order dated the 16th August, 1963 of the Madras High Court in Tax Cases Nos. 100, 219, 220 and 255 of 1962.

Veda Vyasa, Senior Advocate (*K.K. Jain*, Advocate with him), for Appellant.

A. Ranganadham Chetty, Senior Advocate (*A. V. Rangam*, Advocate with him), for Respondent.

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* C.As. Nos. 143 and 144 of 1965. 18th January, 1966.

The Judgment of the Court was delivered by

Sikri, J.—These two appeals by Special Leave are directed against the judgment of the Madras High Court in Tax Cases Nos. 100, 219, 220 and 225 of 1962, and involve the interpretation of section 5 (2) of the Central Sales Tax Act (LXXIV of 1956)—hereinafter referred to as the Act The relevant facts are these. The appellant K.G. Khosla & Co , hereinafter referred to as the assessee entered into a contract with the Director-General of Supplies and Disposal, New Delhi, for the supply of axle-box bodies According to the contract the goods were to be manufactured in Belgium and the D G I.S D , London, or his representative, was to inspect the goods at the works of the manufacturers. He was to issue an inspection certificate. Another inspection by the Deputy Director of Inspections, Ministry of W H & S., Madras, was provided for in the contract. It was his duty to issue inspection notes on Form No W S B 65 on receipt of a copy of the Inspection Certificate from the D.G.I.S.D., London and after verification and visual inspection The goods were to be manufactured according to specifications by M/s La Brugeoies E T Nivelles, Belgium The assessee was entitled to be paid 90 per cent after inspection and delivery of the stores to the consignee and the balance of 10 per cent was payable on final acceptance by the consignee. In the case of deliveries on F O R. basis the assessee was entitled to 90 per cent. payment after inspection on proof of despatch and balance 10 per cent after receipt of stores by the consignees in good condition. The date of delivery was "in 8 months ex your principal's works from the date of receipt of order and the approved working drawings, *i e.*, delivery in India by 31st July, 1957, or earlier." The assessee was entirely responsible for the execution of the contract. Clause 17 (1) of the contract provides :

"The contractor is entirely responsible for the execution of the contract in all respects in accordance with the terms and conditions as specified in the A/T and the Schedule annexed thereto. Any approval which the Inspector may have given in respect of the stores, materials or other particulars and the work or workmanship involved in the contract (whether with or without test carried out by the contractor's Inspector) shall not bind the purchaser and notwithstading any approval or acceptance given by the Inspector, it shall be lawful for the consignee of the stores on behalf of the purchaser to reject the stores on arrival at the destination, if it is found that the stores supplied by the contractor are not in conformity with the terms and conditions of the contract in all respects."

Further, the assessee was responsible for the safe arrival of the goods at the destination By an endorsement the D G I.S D , London, was requested to issue pre-inspection delay reports regularly to all concerned, including the Railway Liaison Officer, C/o D G S. & D , Shahjahan Road, New Delhi He was also requested to endorse copies of the Inspection Certificates to the Director of Inspection, Ministry of W H & S , Bombay. It is further found by the Sales Tax Appellate Tribunal that :

"the Belgian manufacturers, after manufacture, consigned the goods to the appellants by ship under bills of lading in which the consignee was the appellants themselves The goods were consigned to Madras Harbour, cleared by the appellant's own clearing agents and despatched for delivery to the buyers thereafter"

In pursuance of this contract, the assessee supplied axle-box bodies of the value of Rs. 1,74,029.50 to the Southern Railway at Perambur Works and of the value of Rs. 1,32,987 75 to Southern Railway, Mysore. The Joint Commercial Tax Officer held that the former sales were liable to tax under the Madras General Sales Tax Act and the latter under the Central Sales Tax Act He rejected the contention of the assessee that the sales were in the course of import He held that .

"there was no privity of contract between the foreign seller and the Government for the goods. The goods were shipped only as the goods of the seller and intended for them They were cleared as their own and delivered after clearance. The transaction is therefore one of intra-State sales and not one in the course of import The sale is completed only when the goods are delivered in this state and so it is not occasioning the import It is also seen from the contract of sale that the terms of delivery are F O R Madras Again Cl (1) of the contract says that any approval where the Inspector may have given in respect of stores materials or other particulars and the work or workmanship involved in the contract shall not bind the purchaser and notwithstanding any approval or acceptance given by the Inspector it shall be lawful for the consignee of the stores on behalf of the purchaser to reject the stores on arrival at the destination It will be seen from the words underlined by me that the purchaser has reserved the right to reject the goods even though an inspection of the goods

might have been made So there is no force in the argument of the dealer that the goods were appropriated to the contract of sale "

The assessee filed two appeals but the Appellate Assistant Commissioner agreeing with the Joint Commercial Tax Officer, rejected the appeals The Appellate Tribunal on appeal held that the property in the goods had not passed on to the buyers even while the goods were with the Belgian manufacturers and that the sale by the appellants had not occasioned the imports. The Tribunal, however, accepted the contention of the assessee that sales to the extent of Rs. 22,983.75 and Rs. 10,987 50 had taken place in the course of import as the goods had been appropriated to the contract while the goods were on the high seas.

The assessee then filed two revisions before the High Court and the Deputy Commissioner of Commercial Taxes, Madras, filed two revisions challenging the deductions of the two sums of Rs. 22,983 75 and Rs. 10,987 50. The High Court allowed the petitions filed by the State and dismissed the petition filed by the assessee. It rejected the contention of the assessee that the property in the goods must be deemed to have passed at the stage when the goods were approved by the representative in the factory of the manufacturers at Belgium. The High Court further rejected the contention of the assessee that the sale by the assessee to the Government Department had occasioned the import on the ground that " before a sale can be said to have occasioned the import, it is necessary that the sale should have preceded the import ", and as the sale had not taken place at Belgium there was no question of the sale occasioning the import of the goods

Before we deal with the merits of the appeals, we must dispose of two preliminary objections raised by Mr. Ranganadham Chetty, on behalf of the respondents Basing himself on *Management of Hindustan Commercial Bank Ltd* v *Bhagwan Dass*[1], he urged that the assessee should have filed an application for leave to appeal before the High Court before applying, for Special Leave We see no force in this objection. It is common ground that the Madras High Court had at the relevant time consistently taken the view that no application for leave to appeal to Supreme Court lay before the High Court in matters involving revenue In these circumstances we dispense with the requirement of Order 13, rule 2 of the Supreme Court Rules, and overrule the objection. The second preliminary objection raised by him was that the assessee should have filed four appeals and not two appeals because there were four revision petitions before the High Court We see no force in this objection also. Two revisions were filed by the assessee and two by the State in respect of two assessment orders and they were disposed of by one common judgment. The subject-matter of the four revisions were two assessments, one under the Madras General Sales Tax Act and the other under the Central Sales Tax Act In our opinion, the assessee was quite right in filing two appeals before this Court.

The learned Counsel for the assessee, Mr. Veda Vyasa, raised two points before us: First that the sales were in the course of import within the meaning of section 5 (2) of the Act; and secondly, that the property in the goods passed in Belgium and consequently the sales were outside the State within the meaning of Article 286 (1) (*a*) of the Constitution As we are of the opinion that the assessee must succeed on the first point it will not be necessary to deal with the second point.

Section 5 (2) of the Central Sales Tax Act provides :

"5 (2) A sale or purchase of goods shall be deemed to take place in the course of the import of the goods into the territory of India only if the sale or purchase either occasions such import or is effected by a transfer of documents of title to the goods before the goods have crossed the customs frontiers of India "

Section 3 of the Act, which deals with inter-State trade and commerce may also be set out as it employs the same terminology and has been interpreted by this Court. Section 3 reads :

" A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—

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1 A.I.R. 1965 S.C. 1142.

(*a*) occasions the movement of goods from one State to another ; or

(*b*) is effected by a transfer of documents of title to the goods during their movement from one State to another "

It is not necessary to set out the two *Explanations* to section 3.

It seems to us that the expression "occasions the movement of goods" occurring in section 3 (*a*) and section 5 (2) must have the same meaning. In *Tata Iron and Steel Co., Ltd, Bombay* v *S. R. Sarkar*[1], Shah, J., speaking for the majority, interpreted section 3 as follows :

" In our view, therefore, within clause (*b*) of section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto clause (*a*) of section 3 covers sales, other than those included in clause (*b*), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

These observations of Shah, J., were cited with approval by this Court in *The Cement Marketing Co. of India* v. *The State of Mysore*[2]. This case, it is true, was not dealing with the Central Sales Tax Act, but the Court was dealing with a similar question arising under Article 286 of the Constitution, before its amendment. But the same Bench, in dealing with a case arising under the Act (*The State Trading Corporation of India* v *The State of Mysore*[3]), again approved of the observations in *Tata Iron and Steel Co. case*[1] Sarkar, J., observed thus ·

" The question then is, did the sales occasion the movement of cement from another State into Mysore within the meaning of the definition ? In *Tata Iron and Steel Co, Ltd.* v *S R. Sarkar*[1], it was held that a sale occasions the movement of goods from one State to another within section 3 (*a*) of the Central Sales Tax Act, when the movement ' is the result of a covenant or incident of the contract of sale ' That the cement concerned in the disputed sales was actually moved from another State into Mysore is not denied The respondents only contend that the movement was not the result of a covenant in or an incident of the contract of sale "

This Court then, on the facts of the case, found that the movement of cement from another State into Mysore was the result of a covenant in the contract of sale or incident of such contract. This Court did not go into the question as to whether the property had passed before the movement of the goods or not, and this was because according to the decision in *Tata Iron and Steel Co.* v *S.R. Sarkar*[1], it did not matter whether the property passed in one State or the other. *Tata Iron and Steel Co. case*[1] was again followed by this Court in *Singareni Collieries Co.* v. *Commissioner of Commercial Taxes, Hyderabad*[4].

The learned Counsel for the respondent, Mr. A. Ranganadham Chetty, invited us to hold that the observations of Shah, J., in *Tata Iron and Steel Co. case*[1] were *obiter*, and to consider the question afresh We are unable to reopen the question at this stage Shah, J., was interpreting section 3 of the Act, and although the Court was principally concerned with the interpretation of section 3 (*b*), it was necessary to consider the interpretation of section 3 (*a*) in order to arrive at the correct interpretation of section 3 (*b*). Further these observations were approved in *The Cement Marketing Co of India* v *The State of Mysore*,[2] *The State Trading Corporation of India* v. *The State of Mysore*[3] and *Singareni Collieries Co.* v. *Commissioner of Commercial Taxes, Hyderabad*[4]. In the *State Trading Corporation case*,[3] in so far as the assessment for the assessment year 1957-58 was concerned, this Court applied the principles laid down in *Tata Iron and Steel Co. case*[1]. Accordingly we hold that the High Court was wrong in holding that before a sale could be said to have occasioned import it is necessary that the sale should have preceded the import.

The next question that arises is whether the movement of axle-box bodies from Belgium into Madras was the result of a covenant in the contract of sale or an incident of such contract It seems to us that it is quite clear from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from

1. (1960) 11 S T C 655 (1961) 1 S C R 379 : A I R. 1961 S C 65
2 (1964) 2 S C J 287 : (1963) 14 S T C. 175: (1963) 3 S.C R. 777, A I R 1963 S C. 980.
3 (1963) 2 S C 131 · (1962) 14 S T C. 188 : (1963) 3 S C R 792· A.I.R. 1963 S.C.J. 548.
4. A.I.R 1966 S C. 563.

Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose Consequently we hold that the sales took place in the course of import of goods within section 5 (2) of the Act, and are, therefore, exempt from taxation.

In the result the appeals are allowed, the judgment of the High Court reversed and the assessment orders quashed. The appellant will have his costs here and in the High Court. One set of hearing fee.

K S. —— *Appeals allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND V. RAMASWAMI, JJ.

V. M Rv. Mr. Ramaswami Chettiar and another .. *Appellants**

v

R Muthukrishna Aiyar and others .. *Respondents.*

Sale of land—Vendor's liability—Warranty of title—Sale of family properties by Hindu father—Indemnity bond indemnifying against loss—" In case the share of the minor son is set aside and you are made to sustain any loss "—Suit by son to set aside the sale of his half share, decreed—Purchase in Court sale in execution of money decree against son by vendee's nominee of property so decreed—Vendee's possession not disturbed—Measure of damages

A Hindu father sold his family properties and executed an indemnity bond undertaking to pay the amount of loss " in case the sale of half share of the son is set aside and you are made to sustain any loss "

In a suit filed on the foot of the indemnity bond by the vendee's representatives-in-interest for a moiety of the purchase-money and the expenses of defending the suit by the son for his half share, the trial Court found that the plaintiffs had purchased the half share of the son (decreed in his suit to set aside the sale thereof) in Court sale for Rs 736, but decreed the suit on the ground that they could recover the damages claimed on the assumption that third party had purchased in the Court sale The High Court of Madras, in appeal, agreed with the finding of the purchase at Court sale benami for the plaintiffs but modified the decree granting only the sum of Rs 736 paid at the Court sale and another sum of Rs 500 towards the cost of defending the suit by the son. Hence the instant appeal to the Supreme Court by the plaintiffs.

Held, the sale by the father was not void but only voidable at the instance of the son in respect of his half share and on proof of want of legal necessity In such a case the indemnity bond becomes enforceable only if the vendee is dispossessed from the properties in dispute , a breach of the covenant of warranty of title can only occur on the disturbance of possession Further, the indemnity bond states the (father) vendor shall be liable to pay the amount of loss the vendee may sustain by the action of the son.

In the instant case, the only loss sustained by the vendee's representatives (plaintiffs) was a sum of Rs 736 paid for purchase at the Court sale and Rs 500 spent for the defence of the son's suit, which they had to incur for protecting the continuance of their possession of the properties The High Court was right in granting only Rs 1,236 and interest thereon from the date of the suit.

Appeal from the Judgment and Decree dated the 7th January, 1955, of the Madras High Court in Appeal Suit No. 371 of 1949.

R. Ganapathy Iyer and *R Thiagarajan*, Advocates, for Appellants.

M S K. Sastri and *M. S. Narasimhan*, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Ramaswami, J—In the suit which is the subject-matter of this appeal the plaintiffs alleged that Plaint ' A ' Schedule properties belonged to the second defendant and his son, the third defendant. The second defendant sold the village for Rs 28,000 to one Swaminatha Sarma by a sale deed Exhibit A dated 12th December,

* C.A. No. 7 of 1964. 16th February, 1966.

1912, which he executed for himself and as guardian of the third defendant who was then a minor. The second defendant also agreed to indemnify any loss that might be caused to his vendee in case the sale of his minor son's half share should later on be set aside. Accordingly the second defendant executed the Indemnity Bond—Exhibit B in favour of Swaminatha Sarma The sons of Swaminatha Sarma sold Plaint 'A' Schedule village to the father of the plaintiffs for a sum of Rs 53,000. On the same date they assigned the Indemnity Bond—Exhibit B to the father of the plaintiffs under an Assignment Deed—Exhibit D The third defendant after attaining majority filed O S No 640 of 1923 in the Chief Court of Pudukottai for setting aside the sale deed—Exhibit A in respect of his share and for partition of joint family properties The plaintiffs were impleaded as defendants 108 and 109 in that suit The suit was decreed in favour of the third defendant and the sale of his share was set aside on condition of his paying a sum of Rs 7,000 to defendants 108 and 109, and a preliminary decree for partition was also granted. In further proceedings, the village was divided by metes and bounds and afinal decree—Exhibit F was passed on 6th October, 1936.

Meanwhile, a creditor of the third defendant obtained a money decree and in execution thereof attached and brought to sale the third defendant's half share in the 'A' Schedule village In the auction-sale Subbaiah Chettiar, the plaintiff's brother-in-law purchased the property for a sum of Rs 736 subject to the liability for payment of Rs. 7,000 under the decree in O S No 640 of 1923 Thereafter, the plaintiffs have brought the present suit on the allegation that they have sustained damage by the loss of one half of the 'A' Schedule village and are entitled to recover the same from the second defendant personally and out of the 'B' Schedule properties The plaintiffs have claimed damages to the extent of half of the consideration for the sale deed—Exhibit C minus Rs 7,000 withdrawn by them. The plaintiffs claimed a further sum of Rs. 500 as Court expenses making a total of Rs 20,000. The suit was contested on the ground that the Court sale in favour of Subbaiah Chettiar was benami for the plaintiffs and the latter never lost ownership or possession of a half share of the 'A' Schedule village and consequently the plaintiffs did not sustain any loss The trial Court held that Subbaiah Chettiar—P.W. 1 was benamidar of the plaintiffs who continued to remain in possession of the whole village The trial Court was, however, of the opinion that though the plaintiffs had, in fact, purchased the third defendant's half share in the Court sale, they were not bound to do so and they could claim damages on the assumption that third parties had purchased the same. The trial Court accordingly gave a decree to the plaintiffs for the entire amount claimed and made the payment of the amount as charge on 'B' Schedule properties The second defendant took the matter in appeal to the Madras High Court which found that the only loss actually sustained by the plaintiffs was the sum of Rs. 736 paid for the Court sale and the sum of Rs 500 spent for the defence of O S No 640 of 1923 The High Court accordingly modified the decree of the trial Court and limited the quantum of damages to a sum of Rs. 1,236 and interest at 6 per cent. per annum from the date of the suit.

The question presented for determination in this appeal is—what is the quantum of damages to which the plaintiffs are entitled for a breach of warranty of title under the Indemnity Bond—Exhibit B dated 19th December, 1912.

It was contended by Mr. Ganapathy Iyer on behalf of the appellants that in O S. No 640 of 1923, defendant No 3 obtained a partition decree and a declaration that defendant No 2 was not entitled to alienate his share in the 'A' Schedule properties. It was submitted that on account of this decree the appellants lost title to half share of 'A' Schedule properties and accordingly the appellants were entitled to get back half the amount of consideration under the Indemnity Bond—Exhibit B The argument was stressed on behalf of the appellants that the circumstance that the plaintiffs had a title of benamidar to the half-share of the third defendant in Court auction, was not a relevant factor so far as the claim for damages was concerned. It was suggested that the purchase in Court auction was an independent transaction and the defendants could not take the benefit of that transaction. We are unable to accept the contention of the appellants as correct. In the present case it

should be observed, in the first place, that the Indemnity Bond—Exhibit B states that defendant No. 2 shall be liable to pay the amount of loss " in case the sale of the share of the said minor son—Chidambaram—is set aside and you are made to sustain any loss". In the second place, it is important to notice that the sale deed—Exhibit A executed by the second defendant in favour of Swaminatha Sarma was only voidable with regard to the share of the third defendant in the family properties. The sale of the half-share of defendant No. 3 was not void *ab initio* but it was only voidable if defendant No 3 chose to avoid it and proved in Court that the alienation was not for legal necessity. In a case of this description the Indemnity Bond becomes enforceable only if the vendee is dispossessed from the properties in dispute. A breach of the covenant can only occur on the disturbance of the vendee's possession and so long as the vendee remains in possession he suffers no loss and no suit can be brought for damages either on the basis of the Indemnity Bond or for the breach of a covenant of the warranty of title. The view that we have expressed is borne out by the decision of the Madras High Court in *Subbaroya Reddiar* v. *Rajagopala Reddiar*[1], in which *A* who had a title to certain immovable property, voidable at the option of *C*, sold it to *B* and put *B* in possession thereof *C* then brought a suit against *A* and *B*, got a decree and obtained possession thereof in execution In this state of facts it was held by Seshagiri Ayyar, J., that *B's* cause of action for the return of the purchase-money arose not on the date of the sale but on the date of his dispossession when alone there was a failure of consideration and the article applicable was Article 97 of the Limitation Act. At page 889 of the Report, Seshagiri Ayyar, J., states ·

" These cases can roughly speaking be classified under three heads (*a*) where from the inception the vendor had no title to convey and the vendee has not been put in possession of the property , (*b*) where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale , and (*c*) where though the title is known to be imperfect. The contract is in part carried out by giving possession of the properties In the first class of cases, the starting point of limitation will be the date of the sale That is Mr Justice Bakewell's view in *Ramanatha Iyer* v *Ozhapoor Pathirisen Raman Nambudripad*[2] , and I do not think Mr Justice Miller dissents from it However, the present case is quite different In the second class of cases the cause of action can arise only when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed The decisions of the Judicial Committee of the Privy Council in *Hanuman Kamat* v *Hanuman Mandur*[3] and in *Bassu Kuar* v. *Dhum Singh*[4] are authorities for this position "

A similar view has been expressed by the Allahabad High Court in *Muhammad Siddiq* v *Muhammad Nuh*[5], and the Bombay High Court in *Gulabchand Daulatram* v *Survajirao Ganpatrao*[6]. In the present case it has been found by the High Court that P W. 1, the auction-purchaser was the brother-in-law of the plaintiffs and that he was managing the estate of the plaintiffs and defending O S No 640 of 1923 on their behalf. It has also been found that P W. 1 did not take possession at any time and plaintiffs have been cultivating and enjoying the whole village all along and at no time were the plaintiffs dispossessed of the property. The only loss sustained by the plaintiffs was a sum of Rs 736 paid at the Court sale and a sum of Rs 500 spent for the defence of O.S. No. 640 of 1923 which the plaintiffs had to incur for protecting the continuance of their possession over the disputed share of land Accordingly the High Court was right in granting a decree to the plaintiffs only for a sum of Rs. 1,236 which was the actual loss sustained by them and they are not entitled to any further amount. For these reasons we hold that there is no merit in this appeal which is dismissed with costs.

K.G.S. *Appeal dismissed.*

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1. (1915) I L R 38 Mad 887
2. (1913) 14 M L T 524
3. (1892) L.R. 18 I A 158 I L R 19 Cal. 123 (P.C)
4. (1889) L R 15 I A. 211 I L R 11 All. 47 (P C)
5. (1930) I L R 52 All 604
6. A I.R. 1950 Bom 401

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—MR. P. B GAJENDRAGADKAR, *Chief Justice*, K. N WANCHOO, M. HIDAYATULLAH, J. C. SHAH AND S. M. SIKRI, JJ.

K. S Abdul Azeez .. *Appellant**

v.

Ramanathan Chettiar and others .. *Respondents.*

Representation of the People Act (XLIII of 1951), section 39 (4) and Conduct of Election Rules, rule 4—Nomination paper filed for election to an Assembly seat—'Star' symbol reserved for Swatantra Party entered in the first space—The other two spaces left blank—Candidate not of Swatantra Party—If defect of substantial character—Rejection of nomination not proper

It amounted to a defect in completing the declaration so far as 'Star' was shown as the symbol and in so far as the blank spaces are concerned it showed a failure to complete the declaration as to symbols in the nomination paper, they are covered by the composite phrase "failure to complete or defect in completing the declaration as to symbols in the proviso to rule 4 of the Rules, and so they cannot be deemed to be defects of substantial character. Section 39 (4) is attracted to the instant case and the rejection of the nomination paper was not proper as held by the High Court

Appeal from the Judgment and Order dated the 4th March, 1963, of the Madras High Court in Appeal Against Order No. 300 of 1962.

R. Ganapathy Iyer, Advocate, for Appellant.

R. Mahalingier, Advocate, for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Hidayatullah, J.—At the last General Election to the Assembly in the Madras State five candidates filed their nomination papers for the Nilakottai constituency. The appellant K. S. Abdul Azeez was one of them and at the ensuing election he was successful having polled 4,000 and odd votes in excess of those of his nearest rival. Four other candidates had filed nomination papers and they included respondents 3 to 5 in this appeal. One of the candidates withdrew and the nomination paper of the 5th respondent (Peyathevar) was rejected at the scrutiny. He had shown in his nomination paper only one symbol in one of the spaces provided for three symbols and that was the star which is reserved for the Swatantra Party. He was not the accredited candidate of the Swatantra Party and as he had not shown any other symbol, the nomination paper was held to contain a defect of substance.

After the election was over two voters (who are respondents 1 and 2 in this appeal) filed an election petition against the appellant and one of the grounds urged against him, was that as the rejection of the nomination paper of Peyathevar was improper, under section 100 (1) (*c*) of the Representation of the People Act the election was void. Other grounds on which the election was challenged need not concern us because nothing turns upon them in this appeal. The Election Tribunal held that the nomination paper was rightly rejected and dismissed the election petition negativing the other allegations as to the election at the same time. On appeal by the two voters the decision of the Tribunal was reversed and it was held that the nomination paper was improperly rejected and the election of the appellant was, therefore, void. On hearing Mr. Ganapathy Iyer and looking into the relevant provisions on the subject of symbols we are satisfied that the decision of the High Court was right.

The matter has to be considered in relation to the Conduct of Election Rules, 1961. Sub-rule (1) of rule 5 enables the Election Commission to specify the symbols that may be chosen by candidates at elections and the restrictions to which their choice shall be subject By virtue of this power the Election Commission issued a notification No. SO. 2316 dated 19th September, 1961, which showed in a table the symbols for the Madras Legislative Assembly elections Some of these symbols were reserved for recognised political parties and the name of the party was men-

* C.A. No. 435 of 1965. 28th February, 1966.

tioned in brackets against the reserved symbol. Symbols which were not reserved were "free symbols" and an independent candidate, such as the appellant could choose one of them If two or more independent candidates chose the same free symbols lots were to be drawn These rules were in the notification and detailed reference to them is hardly necessary because the matter is perfectly plain.

The question is whether by choosing a symbol reserved for a political party and by leaving blank the space where he could have shown two other symbols as his alternative choice Peyathevar's nomination paper became so defective that it was rightly rejected In this connection we have to see the provision of section 36 (4) of the Representation of the People Act, 1951 Sub-section (4) provides ·

> "The Returning Officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character"

This sub-section must be read with rule 4 of the Conduct of Election Rules. It provides as follows —

> "Every nomination paper presented under sub-section (1) of section 33 shall be completed in such one of the Forms 2-A to 2-E as may be appropriate."

The Form appropriate to this election had a blank space where a candidate could show three symbols in order of preference as symbols of his choice. The appellant showed only the star in the first space and left blank the other two places The nomination paper, therefore, did not comply with section 33 read with rule 4. The nomination paper was however, saved by the proviso to rule 4 which reads :

> "Provided that a failure to complete, or defect in completing, the declaration as to symbols in a nomination paper in Form 2-A or Form 2-B shall not be deemed to be a defect of a substantial character within the meaning of sub-section (4) of section 36"

The Tribunal held that mentioning a reserved symbol and leaving blank the space for alternative symbols, did not come within this proviso and was a defect of substance. The High Court held otherwise and, in our opinion, rightly. In so far as the blank space is concerned it showed a failure to complete the declaration as to symbols and where the star was shown as the symbol it amounted to a defect in completing the declaration as to symbol in the nomination paper. In other words, taking the proviso as a whole the mention of the star and leaving blank rest of the space was covered by the composite phrase "failure to complete or defect in completing the declaration as to symbols".

Mr Ganapathy Iyer contends that a defect in completing the symbol is something like putting down "two bullocks" but omitting the words "with yoke on" or mentioning the "ears of corn" without mentioning "the sickle" in describing the reserved symbols for the Congress and the Communist Parties respectively. We do not agree. If an independent candidate named "star," "bicycle" and "flower" as his preferences there would be no defect in the nomination paper except one, namely, that he included the "star" a reserved symbol to which he was not entitled. The phrase "defect in completing the declaration as to symbols" would obviously cover such a case and there is no difference between that case and this where the star is shown in the first space and the rest of the space is left blank. The intention seems to be that the question of symbols should not play an important part because symbols can be assigned by political parties till the date for withdrawal and nomination paper should not be cancelled during the interval.

On the whole the decision of the High Court was right in the circumstances of this case and we see no reason to reverse it The appeal, therefore, fails and is dismissed but as none appeared to contest it there shall be no order as to costs.

K.G.S. *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, M. HIDAYATULLAH, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.

Ram Gopal Reddy .. *Appellant**

v.

The Additional Custodian, Evacuee Property, Hyderabad .. *Respondent.*

Administration of Evacuee Property Act (XXXI of 1950), section 46—Scope—Property which belonged to an evacuee declared as evacuee property—Person claiming the same as belonging to him not availing of the remedies under the Act—Suit by him for declaration of his title—If barred by section 46.

Transfer of Property Act (IV of 1882), section 53-A—Applicability.

The scheme of the Administration of Evacuee Property Act clearly is that where a certain property admittedly belonged to an evacuee, any person claiming the property or any interest or right therein has, on receipt of notice under section 7 (1) requiring him to show cause why the property should not be declared as evacuee property, to appear before the authorities entitled to deal with the matter. Any person aggrieved by an order of such an authority has the right to appeal under section 24 and if necessary to go in revision under section 27. Having provided this complete machinery for adjudication of all claims with respect to evacuee property, the Act by section 46 bars the jurisdiction of civil or revenue Courts to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property. Where therefore the property or any right to or interest in any property undoubtedly belonged to the evacuee and any transferee from the evacuee claims the property or any right to or interest therein, he has to avail of the remedies provided under the Act. If he fails to do so he cannot file a suit in the civil or revenue Court to have the question whether any property or any right to or any interest therein is or is not evacuee property decided in view of the clear provision of section 46 of the Act.

In a suit filed by the plaintiff for a declaration that he is the owner of certain property, the plaintiff cannot take the benefit of section 53-A of the Transfer of Property Act.

Appeal from the Judgment and Decree dated the 8th April, 1960, of the Andhra Pradesh High Court in Appeal No. 21/1 of 1956.*

T. V. R. Tatachari, Advocate, for Appellant.

N. S. Bindra, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—The only question raised in this appeal on a certificate granted by the Andhra Pradesh High Court is whether the suit brought by the appellant is barred under section 46 of the Administration of Evacuee Property Act, XXXI of 1950, (hereinafter referred to as the Act). The facts are not in dispute and may be briefly narrated.

On 15th November, 1946, the appellant claimed to have purchased certain *patta* lands from one Abdul Aziz Khan and paid him Rs. 6127/8/- in Osmania Sicca. The appellant got possession of the land and thereafter in June, 1949 Abdul Aziz Khan applied in the Tehsil office for the transfer of the *patta* in the name of the appellant. Before, however, any transfer was made, Abdul Aziz Khan seemed to have migrated to Pakistan. Consequently, the Deputy Custodian took steps to declare Abdul Aziz Khan an evacuee. In that connection the appellant received notice from the Deputy Custodian in December, 1950 under section 7 of the Act asking him to show cause why the land should not be declared evacuee property. Though the appellant's case was that he engaged a Counsel to appear on his behalf before the Deputy Custodian, no one seems to have appeared on his behalf, and in consequence, the Deputy Custodian declared the property to be evacuee property. Thereafter the appellant was given a notice requiring him to surrender possession of the land to the Tahsildar. The appellant then made

*C.A. No. 885 of 1963. 6th January, 1966.

* I.L.R. (1961) 1 A.P. 384.

representation before the Deputy Custodian that he had purchased the property from Abdul Aziz Khan in 1946 and was the owner thereof from before the Evacuee Property Law came into force. The Deputy Custodian called upon him to produce evidence and thereafter recommended to the Custodian that the property might be declared not to be evacuee property. The Custodian did not accept this recommendation on the ground that there was no registered sale deed duly executed by Abdul Aziz Khan in favour of the appellant and no transfer of property could therefore be said to have taken place in 1946, and ordered that the declaration of the property as evacuee property should stand and further said that if the appellant was aggrieved by this decision he could obtain a declaration of his rights from a competent Court. In consequence, the appellant filed the suit out of which the present appeal has arisen in the Court of the Subordinate Judge, Nizamabad and prayed that a declaration be made that he was the owner of the property and in possession thereof and that the Custodian be ordered to execute and register a sale deed thereof in his favour. The suit was resisted by the Custodian and the main contention raised on his behalf was that the suit was barred under section 46 of the Act The Subordinate Judge however held that the appellant was entitled to the benefit of section 53-A of the Transfer of Property Act (IV of 1882) and that the civil Court had jurisdiction inasmuch as the sale had taken place before 1947.

The Custodian then went in appeal to the High Court, and the only question raised there was that the suit was barred under section 46 of the Act. The High Court reversed the decision of the Subordinate Judge and held that the appellant had been given notice under section 7 of the Act in December, 1950 and did not appear before the Deputy Custodian with the result that the property was declared as evacuee property The High Court further held that after this declaration the appellant's remedy was to proceed by way of appeal or revision under the Act and that a suit was barred in view of section 46 thereof The appellant's contention that as he was a third party he was entitled to maintain the suit was negatived by the High Court In consequence the High Court dismissed the suit but directed the parties to bear their own costs The appellant then obtained a certificate from the High Court to appeal to this Court, and that is how the matter has come up before us.

We are of opinion that there is no force in this appeal. It is unnecessary to consider the cases cited at the Bar on behalf of the appellant for whatever may be the position of law where the title of the evacuee himself is in dispute, as to which we express no opinion, there can be no doubt that where the property admittedly belonged to the evacuee and the person filing the suit claims to be a transferee from the evacuee, the suit would certainly be barred in view of section 46 of the Act. Section 46 *inter alia* lays down that " save as otherwise expressly provided in this Act, no civil or revenue Court shall have jurisdiction to entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property " It is admitted that the appellant had received notice from the Deputy Custodian under section 7 (1) of the Act but had neglected to appear before him and it was in those circumstances that the Deputy Custodian declared the property to be evacuee property That order of the Deputy Custodian could be taken in appeal under section 24 by the appellant to the authorities provided under the Act, and if necessary the appellant could also go in revision to the Custodian-General under section 27. The scheme of the Act clearly is that where the property admittedly belongs to the evacuee any person claiming the property or any interest or right therein has on receipt of a notice under section 7 (1) to appear before the authorities entitled to deal with the matter under the Act Any person aggrieved by an order of such an authority made under section 7 has the right to appeal under section 24 and if necessary to go in revision under section 27. The Act thus provides a complete machinery for a person interested in any property to put forward his claims before the authorities competent to deal with the question and to go in appeal and in revision if the person interested feels aggrieved. Having provided this complete machinery for adjudication of all claims with respect to evacuee property, the Act, by section 46, bars the jurisdiction of civil or revenue Courts to

entertain or adjudicate upon any question whether any property or any right to or interest in any property is or is not evacuee property. Where therefore the property or any right to or interest in any property undoubtedly belonged to the evacuee and any transferee from the evacuee claims the property or any right to or interest therein he has to avail of the remedies provided under the Act. If he fails to do so he cannot file a suit in the civil or revenue Court to have the question whether any property or any right to or any interest therein is or in not evacuee property decided in view of the clear provisions of section 46 (*a*) of the Act. The fact that the Custodian in his order said that the appellant could go and establish his right in a competent Court is of no assistance to the appellant, for if the law bars the jurisdiction of civil and revenue Courts the Custodian's observation that the party before him could go to a competent Court to establish his right will not confer jurisdiction on a civil or revenue Court Nor can it be said on the facts found in the present case that the appellant had become the owner of the property before 1947 for admittedly the property was worth more than Rs. 100 and it is not disputed that a registered sale deed was necessary to pass title from Abdul Aziz Khan to the appellant. No registered sale deed was executed in this case and therefore the property did not pass from Abdul Aziz Khan to the appellant even upto the time when Abdul Aziz Khan became an evacuee. It may be that if Abdul Aziz Khan had tried to get back the property, section 53-A of the Transfer of Property Act would come to the aid of the appellant in defence But the present suit has been filed to establish the right of the appellant as owner of the property and in such a suit the appellant cannot take the benefit of section 53-A of the Transfer of Property Act. We therefore hold in agreement with the High Court that the suit is clearly barred under section 46 (*a*) of the Act.

The appeal therefore fails and is hereby dismissed . In the circumstances we pass no order as to costs.

V.K. ——— *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT :—P B. GAJENDRAGADKAR, M HIDAYATULLAH AND J C. SHAH, JJ.

Garikapati Veerayya .. *Appellant**

v.

Nannapaneni Subbayya Chowdhary and others .. *Respondents.*

Specific performance—Agreement to sell—Suit for specific performance—Plaintiff-purchaser's readiness and willingness to perform his part—Necessity—Mode of proof of such readiness and willingness

Civil Procedure Code (V of 1908), section 96, Order 6, Rule 7—Departure from specific case set up in plaint —Permissibility—New plea of fact not set up in plaint—If can be raised for first time in appeal

There is no doubt that in a suit for specific performance the plaintiff must show that he was ready and willing to perform his part of the contract from the time the contract was made till the date of decree He must aver in his plaint that he was ready and willing to perform his part of the contract and if the averment is traversed he must prove the said averment Law does not require that in order to prove his readiness and willingness, the plaintiff in a suit for specific performance of an agreement to sell must show that he had ready in his hands the requisite amount which had to be paid by him to his vendor If he proves that he had in his hands such ready amount and was willing to pay it, that of course is a very clear case of the plaintiff's readiness and willingness But the same fact can be proved if the plaintiff can show that at all material times he could have raised the said amount and was willing to do so and was prepared to perform his part of the contract If he fails to allege and prove his readiness and willingness he has no right to claim specific performance

But where the plaintiff filing a suit for specific performance of an agreement to sell does not specifically aver in the plaint, in general terms, his readiness and willingness to perform his part but only chooses to make a clear, categorical and specific plea that he was having the necessary funds ready

* C A. No. 144 of 1961. 8th March, 1963.

with him at all material times and was ready and willing to pay the same to the defendant on his executing conveyance, it would not be open to him to give up that case and to contend in the alternative that even if he had not the cash ready with him as alleged he could have raised the same at all material times

In such a case the new plea of fact that the plaintiff could have raised the amount cannot be raised for the first time in appeal, and the suit for specific performance decreed on the ground that the said plea had been established

Appeal by Special Leave from the Judgment and decree dated 4th March, 1955 of the Andhra High Court in A S No 301 of 1951†

M S. K. Sastri, Nori Subramanya Sastri and *M S Narasimhan*, Advocates for Appellant.

Purshottam Trikamdas, Senior Advocate (*Rasiklal, B Shah* and *K R Chaudhuri* Advocates with him), for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

Gajendragadkar, J—This appeal arises out of a suit filed by respondents 1 and 2 against the appellant claiming specific performance of an agreement to sell the land in suit which had been executed in favour of respondent No 1 by the appellant on 4th December, 1947 The case set up by the said respondents in their plaint was that under the agreement in question, the appellant had undertaken to execute a sale-deed in respect of the property covered by it within a month after the date of the agreement for payment of Rs 11,400 At the time of the agreement, Rs 1,500 had been paid and Rs 2,000 and Rs 1,000 had been paid thereafter on 14th January, 1948 and 2nd February, 1948 respectively Respondent No 1 had kept the balance of the sale-price ready to be paid to the appellant, but the appellant postponed executing the sale-deed and so, the present suit had to be instituted claiming specific performance of the said agreement.

That plaint further alleged that on 16th September, 1948, the second respondent had agreed to purchase the said property from the first respondent for Rs 13,200, and so, the second respondent had joined the first respondent in the present suit. The plaint claimed that the sale-deed should be executed by the appellant in favour of the second respondent To this action, one Manthasa Venkatapathiraju was impleaded as defendant No 2, the appellant having been impleaded as defendant No. 1. The plaint alleged that defendant No 2 claimed to be a prior mortgagee of the suit property and set up some conflicting claims in regard to the said property, and so, it became necessary to add him as a party defendant to the present action.

The claim thus made by the two respondents was challenged by the appellants. His case was that respondent No 1 was not ready and willing to carry out his part of the contract and that after waiting for a sufficiently long period, the appellant had called upon respondent No 1 to pay the balance within four days by a telegraphic notice sent on 1st October, 1948 Since respondent No. 1 did not comply with the said notice, the appellant informed him by a notice on 16th November, 1948 that owing to his default, the contract stood cancelled The appellant's contention was that the cancellation of the contract by him was in the circumstances justified.

Defendant No 2 the alleged prior mortgagee, who had been impleaded as defendant No 2 pleaded that he had been unnecessarily joined to the suit and denied that he had made conflicting statements regarding the subsisting nature of the debt as alleged in the plaint

On these pleadings, the trial Judge framed 6 substantive issues He rejected the appellant's contention that the second respondent was not competent to file the suit along with the first respondent, but he upheld his pleas on other points According to the trial Court, the appellant had validly rescinded the contract, the respondent No 1 had committed breach of the contract and not the appellant, and respondent No 1 was not ready and willing to perform his part of the contract He

† Reported in 1955 An.W R. 502.

also held that the second defendant was not a necessary party to the suit On these findings, the claim made by the respondents was rejected and their suit was dismissed with costs.

Respondents 1 and 2 then preferred an appeal in the High Court of Andhra. Subba Rao, C J and Umamaheswaram, J , who heard the appeal in the first instance differed Subba Rao, C J held that respondent No 1 was ready and willing to perform his part of the contract at all material times and that the appellant was not justified in rescinding the contract As we will presently mention, before the contract was rescinded, respondent No 1 had called upon the appellant to satisfy him about his clear title by producing before him evidence that the prior mortgage over the property covered by the agreement had been satisfied The trial Court had held that this requisition was not *bona fide* and had, in fact, been set up by respondent No 1 to gain time, because he did not have enough money with him to pay the balance to the appellant Subba Rao, C J , differed from this conclusion and held that the requisition made by respondent No. 1 in that behalf was justified and had not been waived as alleged by the appellant

Umamaheswaram, J , on the other hand, agreed with all the findings recorded by the learned trial Judge He held that respondent No 1 was not ready and willing to perform his part of the contract at all material times, that the demand made by him for proof of the discharge of the alleged prior mortgage was not *bona fide* and it was not justified, and according to him, the appellant had validly rescinded the contract.

In view of this difference of opinion between the two learned Judges, the appeal was referred to Chandra Reddy, J , who agreed with the view taken by Subba Rao, C J and so, in the result, the appeal was allowed and the claim made by respondents 1 and 2 was decreed with costs throughout It is against this decree that the appellant has come to this Court by Special Leave.

Before dealing with the merits of the appeal, it is necessary to refer to some more facts in regard to the property with which we are concerned in the present appeal. The said property consists of agricultural land and its area is about 6 acres It formed part of a larger area of 40 acres which originally belonged to one Upadrasta Venkatarama Sastri and his brother's widow Venkata Lakshmamma It appears that on 26th March, 1928, the said two owners had created a simple mortgage in respect of this property for Rs 10,000 in favour of the second defendant On 12th April, 1931, one of the two mortgagors Venkatarama Sastri executed another simple mortgage for Rs 2,000 in favour of the same mortgagee the mortgaged properties being the same as under the first mortgage plus some more lands During the subsistence of these mortgages the mortgagors sold the equity of redemption in the said lands bit by bit until about 11 acres remained with them

The appellant had obtained a money decree against the Upadrasta family in O S No 213 of 1930 in the Court of the District Munsiff at Bapatla In execution of the said decree, the said lands were brought to sale and they were purchased at Court auction by one Raghavayya The sale certificate was issued in favour of the Court purchaser on 7th December, 1942 On 29th October, 1945, the said Court purchaser sold the said property to the appellant Having obtained title to the said property in this manner, the appellant entered into the suit agreement of sale with respondent No 1 on 4th December, 1947

As soon as this agreement was entered into between the parties, the first respondent was put in possession by the appellant The agreement was that the balance had to be paid by respondent No 1 to the appellant within one month and that if it was not paid within the said time, it was to carry interest at 6½ per cent. per annum It is common ground that soon after the property was thus put in possession of respondent No 1, he received nearly Rs 1,200 as income from the crops standing in the field which had been delivered to him The result of this agreement was that respondent No 1 on payment of Rs 1,500 only got possession of the land, and promised to pay the balance within the stipulated time, subject to the condition that on failure to pay the amount, he would pay interest at 6½ per cent per annum on that amount.

After this agreement was passed, respondent No 1 paid Rs 3,000 to the appellant on two dates which we have already mentioned Since he did not pay the balance of the price, the appellant sent a telegraphic notice to him calling upon him to pay the balance within four days This notice was served on 1st October, 1948 The first respondent did not acknowledge receipt of this telegram, but proceeded to ask the appellant to show him the documents of title as well as vouchers to satisfy him that the prior mortgage over the property had been discharged , and he alleged that the appellant was deliberately avoiding to produce those documents and was gaining time This notice was replied by the appellant on 22nd October, 1948 The appellant warned the first respondent that the demand for the documents was a device intended to gain time and that the first respondent knew all about the prior mortgage and was not justified in asking the appellant to produce any documents in that behalf Thereafter on 16th November, 1948 the appellant by notice informed the first respondent that the agreement had been cancelled and called upon him to deliver possession of the property and take back the amount of Rs 4,500 which had been paid by him to the appellant less the amount due to the appellant towards the yield from out of the said lands Further exchange of notices took place between the parties and ultimately on 22nd April, 1949, the present suit was filed

We have already seen that two substantial issues arose between the parties in the present litigation The first issue was whether the appellant was justified in rescinding the contract and the decision of that issue would turn upon the consideration of two other points, whether the time was of the essence of the contract as it was initially made between the parties , if not, whether the appellant was justified in making time the essence of the contract by his notice which he issued on 1st October, 1948 The other aspect of the matter which would be relevant in dealing with the question about the validity of the rescission of the contract by the appellant, is whether respondent No 1 was justified in calling upon the plaintiff to produce satisfactory proof about the discharge of the prior mortgage The other important issue which arose between the parties was whether respondent No. 1 was ready and willing at all material times to perform his part of the contract. Since we have come to the conclusion that the trial Court was right in holding that respondent No 1 has not shown that he was ready and willing to perform his part of the contract, we do not think it necessary to consider the other issue as to the validity of the rescission of the contract There is no doubt that in a suit for specific performance, the plaintiff must show that he was ready and willing to perform his part of the contract from the time that the contract was made until the date of the decree This position is not disputed before us, and so, we will deal with this point in the present appeal.

The true legal position in this matter is not in doubt In a suit for specific performance, the plaintiff must aver in his plaint that he was ready and willing to perform his part of the contract and if the said averment is traversed, he must prove the said averment Law does not require that in order to prove his readiness and willingness, the plaintiff must show that he had ready in his hands the requisite amount which had to be paid by him to his vendor If he proves that he had in his hands such ready amount at all material times and was willing to pay it and get the conveyance executed in his favour, that, of course is a very clear case of the plaintiff's readiness and willingness But the same fact can be proved if the plaintiff can show that at all material times, he could have raised the said amount and was willing to do so and was prepared to perform his part of the contract and carry out the stipulations binding on him If the plaintiff fails to allege and prove his readiness and willingness in this matter, he has no right to claim specific performance.

In the present case, the plaint did not specifically aver in general terms the readiness and willingness of respondent No 1 to perform his part of the contract. The only material allegation made in the plaint was that :

"the first plaintiff kept the balance of the sale-price all along ready and as the first defendant appeared to throw doubts even on this fact, the first plaintiff deposited the balance of Consideration money together with interest at the contract rate of Rs 0-4 per Rs. 100 per month up to that date *viz*, Rs. 7, 290-7-6 in the name of his lawyer Shri Burra Ramamurti on 24th November, 1948,

in the District Co-operative Bank, Tenali and intimated the fact of deposit in the registered notice of that date "

It is true that the issue which was framed in this behalf was a general issue about the readiness and willingness of the first respondent to perform his part of the contract, but the allegation made in the plaint was more precise, concrete and narrow, it was that the first respondent had kept ready with him the whole of the balance due to be paid to the appellant It is significant that when respondent No 1 gave evidence he sought to support this narrow, specific and clear case He stated on oath that he had money ready and he had told the appellant that the money was ready with him and that he would pay it to him immediately if only the appellant was willing to execute the document According to his evidence, by the first week of March, he had kept the balance ready with him It is thus clear that the parties went to trial on this issue by reference to the narrow case made by respondent No 1 that he had the balance ready with him from March, 1948 The trial Court examined the whole of the evidence, oral and documentary, led by respondent No 1 in support of his plea and came to the conclusion that he did not have the necessary money till 23rd November, 1948 to perform his part of the contract, and so, in order to cover up his inability to produce that amount, he made unreasonable demands on the appellant by calling upon him to produce satisfactory evidence about the discharge of the prior mortgage. It may be stated at this stage that though the respondents impleaded defendant No. 2 on a specific plea that defendant No 2 was making contrary claims on the strength of the prior mortgage, at the trial they gave up that plea and offered to have the sale-deed without any proof about the satisfaction of the said earlier mortgage

When the appeal was argued before the High Court, it does not appear to have been urged by the respondents that the finding of the trial Court on the narrow point raised before it was wrong In fact, though there was a difference of opinion between Subba Rao, C J. and Umamaheswaram, J, on other points raised in the appeal, all the three learned Judges who heard the appeal in the High Court have not differed from the finding of the trial Court that respondent No 1 had failed to prove his plea that he had the balance ready with him since March, 1948. The difference arose on the question as to whether it was essential that respondent No 1 must prove that he had the cash with him, or whether it would be enough if he showed that he could have raised the necessary amount at all material times. On this point, Umamaheswaram, J, held agreeing with the trial Court that since respondent No 1 had made a clear, categorical and specific case in that behalf, it was not open to him to give up that case and to contend in the alternative that even if he had not the cash ready with him, he could have easily raised the said amount. Umamaheswaram, J, thought that if such a new plea was allowed to be raised in the appeal for the first time, it would be unfair to the appellant, whereas Subba Rao, C J, took the view that the approach adopted by the trial Court was wrong and that, in law it was open to respondent No. 1 to prove that he could have raised the said amount at the relevant time. In our opinion, the view taken by Umamaheswaram, J, is right Subba Rao, C J, appears to have ignored the specific plea made by the respondents in their plaint He has not noticed the fact that the plaint did not make any averment as it should have about the respondent's readiness and willingness to perform their part of the contract, and the only allegation made in that behalf was that respondent No 1 had the necessary cash at all material times That being so, it would not be right, we think, with respect, to hold that the trial Court was bound to enquire whether respondent No 1 could have raised the said amount. It was open to respondent No. 1 to make that plea and then the trial Court could certainly have considered it But if the first respondent made out a much higher claim and suggested that he would prove that he had the necessary amount in his possession it would not be right to find fault with the trial Court if it considered that plea in the light of the evidence adduced by the respondent in its support and on the merits, rejected it The finding of the trial Judge on the merits is unexceptionable and has not been dissented from in the High Court. The only question which calls for our

decision, therefore, is whether the Appeal Court should have allowed the respondents to make out a new plea of fact for the first time in appeal In dealing with this question, we must have regard to the pleadings made by the parties on the point, and as we have already indicated, the pleas made by the respondents and the evidence led on their behalf unmistakably indicate that their case was that cash was ready in the hands of respondent No 1 and respondent No 1 was willing to pay it to the appellant at all material times

Besides, there are some general considerations which are inconsistent with the view taken by the majority of the Judges in the High Court If respondent No. 1 had the necessary amount ready in his possession, it is very unlikely that the would keep it with himself and not pay it to the appellant, because a fairly large amount lying idle with him carried no interest, whereas non-payment of the said amount to the appellant involved the liability of respondent No 1 to pay interest. That is one consideration which is inconsistent with the case of the respondents.

The other consideration which has not been duly taken into account by the High Court is the conduct of respondent No 1 in depositing the amount on 24th November, 1948, with his lawyer This deposit was made after respondent No. 1 received Rs 6,900 from respondent No 2 on 22nd November, 1948 It is not without significance that respondent No 1 who claims to have had the balance ready with him during the whole of the period, has had to agree to sell the property to respondent No 2 even before a conveyance was executed in his favour and as the trial Court has observed, and rightly, there is every reason to believe that it is out of the amount of Rs 6,900 paid by respondent No. 2 to respondent No. 1 that the deposit came to be made on 24th November, 1948.

In this connection, the demand made by respondent No 1 on the appellant to produce evidence about the discharge of the prior mortgage also throws some light. The respondents solemnly impleaded defendant No. 2 in the present suit on the plea that defendant No 2 was setting up a claim in respect of the property in question, and when defendant No 2 denied that he made any conflicting statements, they told the trial Court that they did not press that part of their case It is unnecessary to consider the evidence led by the parties on this part of the case, but we cannot help observing that the trial Court appears, on the whole to be right in coming to the conclusion that respondent No 1 invented this requisition in order to gain time ; otherwise it is not easy to understand how without satisfying himself that the prior mortgage had been discharged, he agreed to convey a good title to respondent No 2 and how at the trial, both the respondents agreed to take a document from the appellant without adjudication about the said alleged claims of the prior mortgagee. Those general considerations in our opinion, lend strong support to the view taken by the trial Court that respondent No 1 did not passess the necessary cash, and so, could not succeed in the present suit for specific performance. If respondent No. 2 had pleaded at the trial that he would have been able to raise the necessary amount, the appellant would have had an opportunity to meet that case ; but since no such plea was made at the trial, it was not open to him to raise this point for the first time in appeal Therefore, we are satisfied that the High Court erred in entertaining this plea and allowing the respondents claim for specific performance on the ground that the said plea had been established.

The result, is the appeal is allowed, the decree passed by the High Court reversed and that of the trial Court restored with costs throughout.

V.K. *Appeal allowed.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—M. HIDAYATULLAH, J. R. MUDHOLKAR, R. S. BACHAWAT AND J. M. SHELAT, JJ.

T. D. Gopalan .. *Appellant**

v.

The Commissioner for Hindu Religious and Charitable Endowments, Madras . *Respondent*

Constitution of India (1950), *Article* 133 (1) (a) *and* (b)—*Dispute as to whether suit property was private alienable property or a public temple—If incapable of valuation for the purposes of Article* 133 (1) (a) *or* (b).

Where the dispute between the parties to a suit centres round the question whether the suit property is private alienable property of a certain family or is a public temple, it cannot be said that the subject-matter of the dispute is incapable of valuation for the purpose of grant of a certificate under Article 133 (1 (*a*) or (*b*). The subject-matter of the dispute has to be ascertained with reference to the claim made by the plaintiff in the plaint and where according to the plaint the property is the private alienable property of a family, the Court ought to value the property accordingly for the purposes of Article 133 (1) (*a*) or (*b*), though according to the defendant the property is inalienable and is a public temple which could have no market value.

Appeal by Special Leave from the Judgment and Order dated the 11th January, 1961 of the Madras High Court in S.C. Petition No. 165 of 1960.

R. Ganapathy Iyer and *R. Thiagarajan*, Advocates, for Appellant.

A. V. Rangam, Advocate, for Respondent.

The Judgment of the Court was delivered by

Shelat, J.—This appeal by Special Leave is against the order of the High Court of Madras dated 11th January, 1961 refusing the certificate under Article 133 (1) (*a*) and (*b*) of the Constitution.

The authorities appointed under the Hindu Religious and Charitable Endowments Act, (Madras Act II of 1927) having held that the premises No. 29, South Masi Street, Madurai, wherein the idol of Sri Srinivasaperumal and certain other idols were located constituted a temple within the meaning of the said Act, the appellant filed an application in the District Court for a declaration that the said premises were private property and for an order setting aside the said decision. The said application was by an order of the High Court converted into a suit. The main question in the suit was whether the said premises could be said to be a temple as defined by Madras Act XIX of 1951. The District Judge, Madurai, decreed the suit in favour of the appellant holding that the aforesaid premises did not constitute a temple and set aside the decision of the said authorities. On appeal, the High Court reversed the said judgment and decree and found that the premises in question constituted a temple. The appellant thereupon filed a petition for leave to appeal to this Court and submitted that the value of the subject-matter of dispute in the District Court as also in appeal in the High Court was more than Rs. 20,000 and that the judgment of the High Court having reversed the judgment and decree of the trial Court he was entitled to leave under Article 133 (1) (*a*) and (*b*). The High Court dismissed that application on the following grounds: (*a*) that the subject-matter of the dispute, whether it was a private or a public temple could have no market value and therefore was incapable of valuation, (*b*) that clause (*b*) of Article 133 (1) could not apply as the judgment and decree passed by it did not involve directly or indirectly a claim or question respecting property of the value of Rs. 20,000 or more; and (*c*) that the appeal did not involve any substantial question of law.

For the time being we are concerned with grounds (*a*) and (*b*) and not with ground (*c*) as the contention raised by Mr. Ganapathi Iyer for the appellant was

*C.A. No. 230 of 1964. 5th April, 1966.

that the refusal to grant leave by the High Court under either of the clauses (*a*) and (*b*) of Article 133 (1) was not correct.

The point for consideration is whether the High Court was right in holding that the property in question whether as a private or a public temple was incapable of valuation as it could have in either case no market value It may be observed that the appellant claimed that the property belonged to the Thoguluva family and he was in management thereof for and on behalf of the family The suit in the first instance was filed by him in the form of an application, being O P No 37 of 1950 under section 84 (2) of Madras Act II of 1927 Under that Act only a fixed Court-fee was payable That being so, the appellant did not have to pay Court-fees as it would in the case of an ordinary suit on a valuation made by him therefor The application was subsequently converted into a suit by an order of the High Court He was therefore entitled to contend at the time of the leave application that the property in dispute was of the value of not less than Rs 20,000.

It does not appear to be in dispute that the site of the Mandapam and the structure standing thereon was originally the property of one Kuppaiyan and his undivided sons The appellant's case was that in execution of the decree in suit No 650 of 1882 passed against the said Kuppaiyan the property was sold by public auction and purchased by Thoguluva Thirumalayyan, the appellant's ancestor, for a sum of Rs 1,060 The original mandapam was thereafter improved upon and some additional structures *e g*, shops and other constructions were added, the expenses for such repairs and additions having been met by the descendants of the said Thoguluva Thirumalayyan, and therefore the property belonged to and was an alienable private property of the family On the other hand, the case of the respondents in their written statement was that the property was a public temple for public religious worship and that the allegation of the plaintiff that it was a private property capable of alienation was "false and misleading" The case of the appellant was accepted the trial Court but was rejected by the High Court and the High Court held that the property was a public temple within the meaning of Madras Act XIX of 1951.

The dispute between the parties was thus centered round the question whether the property was the private alienable property of the said family or was a public temple as held by the High Court There was evidence that the shops subsequently constructed as aforesaid were let out to tenants for a number of years and property taxes were levied thereon by the Madurai Municipality, presumably on their rateable value We may also mention here that on his application to this Court for directing an inquiry into the value of the property under Order 45, Rule 1 of the Code of Civil Procedure the appellant has stated that he has in his possession municipal receipts showing the property tax paid to the Madurai Municipality According to the appellant, property tax for the half year ending 30th September, 1950 was Rs 94-0-6 and for the half year ending 31st March, 1961 it was Rs 130 36nP. According to him the half-yearly tax would be equivalent to one month's rent and on that basis the annual rental value would come to Rs 1,126-6-0 in 1,950 and to Rs. 1,672-32 nP in 1961 If that be so, capitalising that value at twenty times the annual rental value, the value of the property would come to more than Rs 20,000.

The refusal of the High Court to grant leave was based on the observation that whether the property is a private or a public temple it was incapable of valuation. But as observed earlier the appellant's case was that the subject-matter of dispute in the suit was the private property of the said family and that it was alienable property and therefore capable of a valid transfer That being the dispute between the parties, the High Court was not right in assuming that whether the property was a private or a public temple, it was incapable of valuation The subject-matter of the dispute has to be ascertained with reference to the claim made by the plaintiff in his plaint and since according to the plaint, the property is the private property of the said family capable of alienation, the High Court ought to have valued the property accordingly and though according to the respondents the pro-

perty was inalienable and was a public temple. The High Court was thus wrong in proceeding on the aforesaid assumption.

We would therefore allow the appeal, set aside the order passed by the High Court and remand the case to the High Court to decide the application for leave in accordance with the observations made in this judgment The High Court may either hold the inquiry itself or remit the case to the trial Court to hold such inquiry and report to it Accordingly, the appeal is allowed and the High Court's order is set aside. The respondents will pay to the appellant the costs of this appeal.

V.K. *Appeal allowed.*

[END OF VOLUME (1966) II M.L J. (S C)]